

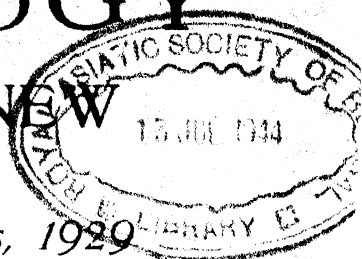






# PENOLOGY

## OLD AND NEW



*Tagore Law Lectures, 1929*

BY

**PROSANTO KUMAR SEN**

M.A. (Cal.); M.A., LL.D. (Cantab).

*Of Gray's Inn, Barrister-at-Law; Advocate, Patna High Court; sometime Judge, Patna High Court; sometime Prime Minister, Mayurbhanj State; Tagore Professor of Law, Calcutta, 1916; Author of 'The Law of Monopolies in British India,' 'A Manual of the Law of Torts,' 'From Punishment to Prevention,' etc.*

With a foreword by

The Hon'ble Sir Maurice Gwyer, K.C.B., K.C.S.I.

*Chief Justice of India*

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## PREFACE

These lectures are being published as the Tagore Law Lectures for the year 1929. A few words of explanation are necessary to account for the seeming delay in their preparation and publication. In fact, there has been little or no delay.

It was in the summer of 1939 that I had the honour of being invited by the University of Calcutta, in accordance with the provisions of Rule 5-A of the Tagore Law Professorship Foundation, to deliver a course of lectures on Penology. As no appointment of a Tagore Professor had been made for the year 1929, the University authorities antedated my appointment and made it for 1929. In the circumstances, the lectures could not be delivered before April, 1940, *i.e.*, a few months after the actual appointment. Whatever delay has since happened in the matter of their printing and publication is to be attributed to the difficult conditions brought on by the World War.

The lectures contain a rapid review of the past and present development of thought in Penology, and of the practical endeavours which aim at realising the true aims and objects of Penology. They also give an indication of the direction which Penology should take in the near future.

I am deeply indebted to Sir Maurice Gwyer for the Foreword with which he has sponsored this book. His interest in Penology is well-known to those who have had the privilege of being associated with him in the cause of Indian penal reform. Anything from his pen carries its own weight. He has laid the public and the author under obligation by this his latest contribution to the literature of Penology.

Lectures V, VI and VII deal with Hindu Penology in ancient India. They were capable of more exhaustive treatment, as the materials available are plentiful. But I have purposely avoided details and have kept in view the salient features which alone matter. It is hoped that these lectures will afford some guidance to students of Penology who may care to investigate further in matters of detail. I take this opportunity of expressing my indebtedness to my friend Dr. Ananta Prasad Banerji Shastri, Professor, Patna College, for the ungrudging help and co-operation which I have received from him in the preparation of these three lectures.

I have endeavoured to make the Index and the Table of Contents as full and complete as possible, and I trust they will be found useful.

P. K. SEN.

BAYLEY ROAD, PATNA.

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## FOREWORD

I am very glad that Dr. P. K. Sen is publishing in book form the Tagore lectures which he recently delivered on "Penology, Old and New", and I willingly accede to his invitation to write this Foreword.

The book appears at an opportune moment, when, under the impact of the War, a general review and re-examination of the fundamental ideas which underlie all the aspects of our social system is now in progress throughout the whole world. I ventured, in the Inaugural Address which I had the honour of delivering at the first session of the Indian Penal Reform Conference two years ago, to draw attention to the curiously detached view which seemed to me to be taken in India of all matters relating to crime and punishment. I hazarded the opinion that this might be due in part to the sense of fatalism which pervades much of Indian thought; but it has since occurred to me that another cause may be the almost total absence of information with regard to what has happened or is happening in other countries, whether in the sphere of theory or of practice. It is for that reason especially that Dr. Sen's book is to be welcomed. He traces with skill and insight the evolution of thought in matters of crime and punishment from the earliest times to the present day. He shows how deeply the ancient Hindu lawgivers had studied the problem and how near some of their theories come to modern doctrine. He gives a full and lucid description of the immense advance in the science of penology which has taken place in Europe and America during the nineteenth and twentieth centuries, and of the systems at present in force or under trial which have for their purpose the recon-



cing of the claim of the State to protect itself against the criminal with the claim of the latter to be regarded not only as a criminal but also as a human being and a fellow citizen.

Dr. Sen's treatment of his subject is as objective and impartial as a scientific investigation demands; but it is not difficult to see where his own sympathies lie, and his comments are inspired by a humane and generous judgment. I warmly commend the book to all those who are interested in the building of the new structure of society which must surely emerge after the War, unless the War has been fought in vain,—a society built upon the firm foundation of human personality, in which the rights of the State are not omnipotent but are no more than the sum of the rights of all the citizens who compose it.

I think that any reader of Dr. Sen's pages must be struck by the singular difference between the Anglo-Saxon countries and the countries in continental Europe in their approach to the difficult and complex problems discussed in this book. In the latter we find a far more elaborate discussion of the nature of crime and punishment, and of the metaphysical and ethical principles which underlie the conceptions of morality and responsibility; and Italian penologists in particular have, since the time of Beccaria, achieved in this sphere a just and lasting fame. The Anglo-Saxon countries, as is their custom, have proceeded more empirically and by way of trial and error; but I think that the administration of the criminal law and the treatment of criminals in those countries will be found to afford a more practical and useful illustration of applied principles than in those which have proclaimed, and often accepted, the principles themselves. Nor can we shut our eyes to the effect

of totalitarian doctrine upon even the most advanced and humane principles which have been in theory at any rate received into the jurisprudence of the dictator countries.

It seems likely that India will adopt by preference the empirical method, as indeed she is doing already. But she has at any rate this advantage, that she can satisfy herself by a study of the more doctrinaire exponents of continental theory, whether the empirical methods are proceeding on sound and fruitful lines; and I can conceive nothing more valuable for this purpose than Dr. Sen's book. I hope that it will have a wide circulation, not only among administrators and those concerned in the formulation of Government policy, but also among social workers and the more intelligent portion of the lay people. Nothing but good can come of a more general diffusion of the facts and information which it contains; and I wish it all success.

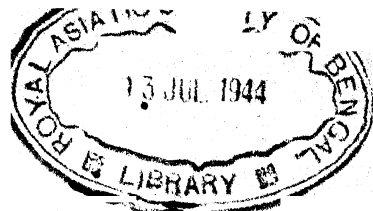
MAURICE GWYER.



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# PENOLOGY: OLD AND NEW

## LECTURE I

### INTRODUCTION.

The treatment of crime and criminals forms a vast and comprehensive subject of study. Viewed in its theoretical and practical aspects it furnishes material for various branches of knowledge. With gradual differentiation and specialisation these are ever on the increase. Ancient systems of law and jurisprudence, however, did not indulge in exceeding specialisation. Just as Philosophy in olden days took in within its folds a large range of subjects—metaphysics, psychology, sociology, ethics, politics, civics, eugenics and the like—even so Law dealt not only with civil and criminal law and procedure but had in it the germs of criminology, penology, psychology, sociology and many another allied science or art. Nor was it usual in ancient literature to make a distinction between the study of crime and criminals from the speculative point of view, as a science, and from the practical point of view, as an art.

### PENOLOGY AND CRIMINOLOGY.

The modern terms criminology and penology are regarded by some as almost pointing to these two respective aspects of the same branch of knowledge, and to correspond to the German expressions—*Gefängniswesen* and *gefängnissskunde*. Useful as is the present day differentiation between diverse branches of knowledge, there is obvious mischief in making the barriers between them too pronounced, specially as between criminology and penology. "For," as I have said elsewhere,<sup>1</sup> and the statement holds true, "it is indeed a thin line which divides the two sciences and it is being recognised more and more that the connection between them is so intimate that their problems inevitably overlap. With this recognition the distinction between penology and criminology is rapidly disappearing. *La science pénitentiaire* is to-day an ever widening investigation in which criminology and penology merge and the problems of the two require and receive the same attention." Nevertheless, it cannot be gainsaid that there are problems, speculative or practical, which are special and peculiar to criminology or penology, as the case may be.

<sup>1</sup> In my work *From Punishment to Prevention*, p. 1—Oxford University Press, 1932.

Penology may justly be regarded as among the younger of the sciences. In the West it is only about a century old, but in this country it is considerably older, as will presently appear.

An interesting claim is put forward in America to the effect that the word penology is a coinage of Francis Lieber in the year 1834. "In 1834 he (Francis Lieber) mentions in his diary among the subjects continually in his head that of 'Penology'. He coined the word from his brain; later, he defined it in a letter to de Toqueville as that branch of criminal science which occupies itself (or ought to do so) with the punishment and the criminal; not with the definition of crime, the subject of accountability and the proving of the crime which belong to criminal law and the penal process."<sup>1</sup> This definition is not very explicit. It seeks to draw a line of demarcation between penology on the one hand, and criminal law and penal process on the other, which deal with the ingredients that go to make particular offences and the methods of dealing with such offences. It omits to point out the special sphere of penology which is to lay down the fundamental principles that should guide the State, or the sovereign authority, in framing its scheme of punishments.

Apart from its comparatively recent growth in the West, which may be admitted, there is some hesitation in certain quarters even to acknowledge it as a science. "Science", it is said, "is too bold a word to use in defining penology. The use of this term presupposes a knowledge of the facts, a rigidity of analysis and a soundness of deduction which does not exist as yet in this field of study."<sup>2</sup> This observation can scarcely be justified. The standards of certitude vary from science to science. A science that deals with human material must necessarily put up with lesser exactitude in the matter of factual data, analysis or deduction. Thus psychology, individual and collective, sociology, economics, indeed all sciences dealing directly or indirectly with human conduct must for obvious reasons be subject to this drawback. Their quality of certitude will differ from that of an exact science such as mathematics and will be commensurate with just that amount of certainty, or uncertainty, that attaches to human conduct.

<sup>1</sup> Francis Lieber, *Prison Reform and Criminal Law—Correction and Prevention* (New York: Russell Sage Foundation, Charities Publication Committee, 1910), p. 146. See Louis N. Robinson's *Penology in the United States*, p. 11—John C. Winston, Philadelphia, 1923. Similarly, Dr. Frederick Howard Wines attributes the coinage of the term to Francis Lieber. See *Punishment and Reformation*, p. 2—Thomas Y. Crowell Co., 1918.

<sup>2</sup> Louis N. Robinson, *Penology in the United States*, p. 11—John C. Winston Co., 1923.

## CRIMINAL LAW, PENOLOGY AND CRIMINOLOGY.

What then is the relation between criminal law, penology and criminology? To begin with, they are all included in the more comprehensive term 'criminal science'. In order of evolution it is criminal law that comes first, penology comes next and criminology comes last. Indeed, criminology has been described as "a secondary evolutionary consciousness of the study of penology."<sup>1</sup> It will, however, need a short historical digression to understand how this evolution has come about in the West. It is only the first of the three, criminal law and procedure, with which it is thought the legal profession is concerned. But the day is fast approaching when it will be realised that the study of criminal science as a whole, including penology and criminology is a pressing duty not only with lawyers but with the thoughtful community at large. Criminal law treats of those provisions which the King, the State or the legislative authority has laid down for dealing with certain violations of the code of conduct which are called public wrongs or offences.<sup>2</sup> These provisions, penal in character, are prescribed for the maintenance of peace and order in every organised society. They take the form usually of punishments calculated to serve as checks on repetition, or similar violation in future. The scheme of punishment may have for its basis one or more of the following ideas,—Vengeance, Intimidation or Deterrence, Expiation, Correction. It will be our endeavour to analyse in due course different systems, and discover which of these elements may or may not be present in them.<sup>3</sup> It is sufficient for our present purpose to say that the idea of intimidation, or deterrence is as old as the world and enters in more or less degree into every scheme of punishment, very often combined with the idea of expiation, at other times largely tinged with the idea of vengeance, but only rarely tempered by the idea of correction or reformation of the offending individual, or balanced by a conscious aim at social defence. Intimidation, repression or deterrence is the fundamental idea that lies at the root of criminal law everywhere in all ages and climes. In most ancient communities the King is the seat of authority. In him is vested the divine right to punish the wicked, and the punishment must be in proportion to the gravity of the offence. The royal person is regarded as representing divinity, the fountain-head of right and justice. It is his hand which through the

<sup>1</sup> See introduction to the English version of De Quiros on *Modern Theories of Criminality* by W. W. Smithers, Chairman of the Committee on Translation of the American Institute of Criminal Law and Criminology and Secretary of the Comparative Law Bureau of the American Bar Association—Little Brown & Co., Boston, 1912.

<sup>2</sup> See Kenny's *Criminal Law*.

<sup>3</sup> Lectures II, III and IV.



law of the land administers justice and gives chastisement to offenders, so that they may be kept in check, and peace and order may prevail.

Underlying this law, ancient or modern, are several principles that enter more or less into its spirit and determine its letter. Criminal law and procedure do not deal with them. A scientific study and treatment of these is the proper province of penology. Let us briefly consider some of these principles.

### THE CLASSICAL SCHOOL.

First, there is the objective principle of the so-called Classical School, which rests on fitting the punishment to the crime, and not to the criminal. There were punishments of diverse kinds ingeniously invented with the object and in the belief that they would fit the respective crimes. We shall have occasion to go into the history of the evolution of punishment<sup>1</sup>. Suffice it to say now, without touching the fringe of that history, that at present there are, roughly speaking, only three modes of punishment prescribed—imprisonment, fine and, in certain special cases, death. The first two may be graduated or modulated—the length of the period of imprisonment, or the circumstances of severity of the imprisonment, being made to vary not with reference to the offender but with reference to the gravity of the offence as disclosed by the objective circumstances of its commission. How is the gravity to be ascertained? Various standards have been adopted at various times. In the last analysis it appears that it should be ascertained in terms of its effect on society. Hence in some countries, though not in all, it has been thought that the gravity or otherwise of an offence is to be determined by the dangerousness or formidability (*témibilité*, *periculosity*) of the offence in relation to social order. In essence, the position of the so-called classical school of thought may be thus indicated: It beholds offence as an objective fact and, to meet it, lays down an objective punishment. Here is an offence, there is a punishment—the latter balances, equates, cancels the former. The punishment works off, as it were the wrong or injury done by the offence to the individual or the community. In this notion of working off there is implicitly, no doubt, an element of the idea of expiation. Wherever it becomes explicit it serves as a bridge leading from the entirely objective to a partially subjective standpoint. For what is expiation unless the person who goes through it is a conscious, willing subject? All expiation has a psychological back-ground. It is the inner consciousness of the man that he is working off his evil deed that constitutes the very essence of expiation. From this consciousness again to that of correction is a logical, though not necessarily a speedy, develop-

<sup>1</sup> See Lectures II and III.

ment. Thus it will be found that the world owes not a little to the expiatory idea for enabling the classical conception to shed its rigid objectivity, and the penal systems to look more to the criminal than to the crime alone.

There is another ingredient in the classical scheme which must be touched upon: It is the sense of equality before the law, which demands equality of punishment for all. If two men have committed the same wrong against society, their punishment must be equal. There is no justifiable reason, it is said, why an individual who has committed the same offence as another should be visited with a lesser or greater punishment than that other. All must be equal in the eye of law and therefore, logically, they must be subject to the same punishment for the same offence. This idea of so-called equality imparts to the classical scheme a greater rigidity. Combining the principle of objectivity above referred to with this principle of equality the conclusion is reached that an offence is to be taken in its definite objective, physical, outwardly manifest form; that a definite objective punishment must be prescribed for it; and that such punishment must apply to all alike without the least variation. The reason given is that the law should be no respecter of persons—all are equal in the eye of law. Thus we need not inquire into the personality of the offender, his antecedents, his heredity, his family and up-bringing, his early associations, his temptations and trials, perchance his unemployment and indigence, his heroic but futile efforts to rise above untoward conditions. It does seem an abstract, unnatural, artificial standard. Here is a Jean Valjin who has been through hunger and penury and has seen his family starve before his eyes. Must he be judged by the same standard as another who while in the enjoyment of plenty and prosperity has committed theft? This inexorable law would say 'Yes'. The personality of the individual, his physical and mental make-up, his good or evil heritage or environments, cannot be a factor in determining punishment. For how is it possible, it is said, to look into the antecedents of each individual, his mental furniture,—self-acquired or hereditary—or the causal factors determining his volitions? It is too psychological, too metaphysical and subtle. The rigid machinery of law cannot take note of all these. The individual must be regarded as a mere unit and one unit is just as good as any other. Thus according to the objective view it is not the offender committing the offence but the offence itself that calls for punishment. It is the disease, so to speak, and not the patient that must be considered. As diseases may be labelled and specifics told off against each, so are offences to be labelled and punishments prescribed. This treatment of offences may seem to be logically and mathematically accurate, but it is hopelessly mechanical. It is singularly

inaccurate and inappropriate for human beings of whom no two are alike. In the larger sense of justice it is not just. Hence the need for a change of outlook.

It is at this point that the science of criminology emerges from the study of penology. It may, therefore, be regarded as complementary to penology. It seeks to investigate the numerous causal agencies that lead to crime. Are crimes determined by physical, anthropological, physiological, or hereditary factors? If so, to what extent? How far is the responsibility of the criminal attenuated or aggravated by the presence or absence of such determining causes? Or, are crimes the product of volition, the result of the action of free and responsible individuals unaffected by determining conditions? If the latter, they must make their authors fully liable. These and other problems which flow from the science of penology are treated in the sister science of criminology which in turn brings to its aid the study of many another science such as psychology, anthropology, sociology, psychiatry, etc.

It will appear in the course of these lectures how and at what point the science of criminology historically takes birth.

#### RELAXATION OF THE CLASSICAL IDEA.

To come back to the main topic, the rigid objectivity of the classical school of thought above referred to could not possibly last. The world has witnessed the phenomenon in all countries and in all systems that when a certain machinery or provision of law becomes antiquated and ceases to reflect the public conscience or answer its requirements, forces are set at work which enter, so to speak, by the back door, if not by the front gate, and gradually and imperceptibly modify the spirit and letter of the prevalent law so as to adapt it to the legitimate demands of society. Even so in this case, gradually and imperceptibly, changes began to appear. Let us consider some of these silent forces and their effect on penology of the present day.

#### EXTENUATING FACTORS.

Take for instance the doctrine of 'extenuating circumstances'. What is it but a relaxation of the principle that, given the offence the punishment prescribed for it is ascertainable with mathematical certainty? It means that there are often features, facts and circumstances, connected with the offending act which should materially affect the punishment to the advantage of the offender. The principle lays down that the law must look not at the offence alone but at the whole setting of circumstances connected with it and if the redeeming features are present it must proceed to modulate the punishment according to certain recognised canons. True, the standpoint is still

objective, because it does not relate to the personality of the individual but to the differentiating circumstances connected with the offence itself. But the point of departure consists in this that it allows differentiation to enter into the question and to modulate the punishment for an offence, in the teeth of the orthodox formula of 'the same punishment for the same offence.'

### THE JURY.

An important contribution towards the relaxation of the rigid classical idea has been made by the Jury. Ordinarily, the respective functions of the judge and the jury are marked out by saying that the judge is the interpreter of the law and is the proper authority to apply it, whereas the jury is the master of the facts and is the proper authority to give its verdict on them. But there is a latent conflict between these two essential factors in the administration of justice—the judge and the jury. Law must reflect the public conscience and wherever in its application by the judge it runs, or it threatens to run, counter to prevailing notions of justice, the jury has a tendency to stand up for them and shape its verdict of condemnation or of acquittal accordingly. Where the law looks only at the offence and disregarding the offender rigidly applies the prescribed punishment, the jury refuses to remain indifferent to the personality of the individual offender, his motives, his antecedents, his former life, his general moral outlook. In theft or analogous crimes, in crimes of passion, in crimes committed in a state of insanity or semi-insanity, this is not unoften the case. The jury prefers to look more at the individual than at the crime committed by him. Hunger, privation, previous association and environment, instinctive and perhaps irresistible passion might have swept the offender off his feet and led to the commission of the offence. If the law cannot take these into consideration to measure the offender's accountability, the jury does. Often and often the jury has by its verdict shown its resentment at what may be called the obsession of justice by law which has ceased to reflect the social conscience of the day. The jurors, more human and less obsessed by law, perhaps freer to follow the dictates of social conscience, get absorbed in their estimate of the individual in relation to the play of adverse forces of which he was the victim while committing the offence. In defiance of the law they bring in a verdict of 'not guilty'. The verdict may really be perverse, flagrantly circumventing the law. But it illustrates how public opinion, through the jury, affects and determines the administration of law. The classical idea is, in the last analysis, based on the conception that every individual is free to do the right and abjure the wrong, and is therefore fully responsible for his actions. The public conscience is opposed to this abstract and

unreal idea of individual freedom, and sets itself up through the jury to counteract it, though the method adopted is far from being scientifically correct or reliable, as it may give way, and often does, in particular cases, to transient public feeling. Owing to these factors of instability, the verdicts of juries are often inconsistent leading to decisions which appear capricious. "Each jury has its own standards of judgment, and each jury man individually has his. It is almost a justice of chance, which is the worst and most disconcerting of all".<sup>1</sup> Nevertheless, it has to be admitted that in trying to secure the end that punishments must fit the criminal and not only the crime the jury has, in its own way, played a conspicuous part in the history of penology.

### THE JUDICIARY.

The change of outlook has also been assisted by the judiciary. It is not for the judge to circumvent, but faithfully to follow, the law. Circumscribed as he is by statute law or case law, he has to keep himself within the limits prescribed by it. Nevertheless, in all countries the judge has always inclined to take into consideration the circumstances under which an offence is committed—not only objective circumstances connected with the offending act itself but subjective matters relating to the character and personality of the offender. He is not obsessed with the metaphysics of the doctrine of responsibility. He looks at the case in a plain, matter of fact manner. He looks at the motive as well as the act to which it has led the offender. If the motive carries no dishonour, or implies no degenerate trait, he seeks as far as possible to regulate the severity of the punishment accordingly. If the act discloses subjective criminality, or perversity, he metes out punishment calculated to prove an effective deterrent. In so modulating the punishment according to the subjective or psychological quality of the act he often has to strain the law to its utmost capacity and sometimes even to circumvent it. In the result, he reflects in his decision the social conscience of the day which finds the law to be an anachronism. The cumulative effect of such decisions is gradually to bring about a modification of the law, probably followed in due course by statutory enactment to confirm it. The repugnance of jurors and judges to excessive punishments and their preference for acquittal is thus a psychological fact which has contributed to the end of lessening their severity and bringing them more in line with intelligent public opinion.

<sup>1</sup> Raymond Saleilles *Individualisation of Punishment* (Translation),—William Heinemann, London, 1911.

## STATUTE AND CASE LAW.

The reaction of judge and jury on statute and case law is the next important fact to be considered. Statute law has its own advantages and disadvantages. The advantage is that it is definite, and free from ambiguity and acts uniformly on all. Hence flows the disadvantage that it does not lend itself to variation in individual cases, unless variation has been provided for in the shape of exceptions or provisoes. In the criminal law this inflexibility is in one sense eminently proper as, otherwise, the fundamental principle of equality of all before the law is violated. Besides, it is deemed to be imperative that the law shall be effectively deterrent. If the affirmative provision of law be riddled with many negatives (in the shape of exceptions) it loses in efficacy as a deterrent. Intimidation to all prospective law-breakers is believed to be the sound principle to follow ; and most law-givers, ancient or modern, have prized it and pursued it. The old Hindu law-givers significantly described it as *Mayuradharmā* or the way of the peacock, meaning that, like the peacock that puts up its multi-coloured plumes to display its majesty, the law must be intimidative in order to retain its majesty in the eye of the subject. As distinguished from statute law, case law is perhaps less rigid, more elastic, as it lends itself to being interpreted, distinguished and thus slowly modified to suit changing conditions of society. This is done by the judges. Even statute law is in practice gradually modified by judicial interpretations leading to conflict of judicial decisions which has to be laid at rest by amendments.

## CHANGING SOCIAL VALUES.

The principal cause of modification of criminal law by jurors, judges and legislators is the endeavour to bring it into line with the changing social values. Apart from the psychology of the offender which, as above referred to, enters into the estimate of punishment and has the effect either of relaxing its severity or preventing its application in particular cases, the very effect of punishment as a means of repression has in course of time come to be questioned. The belief that punishments are the best and most effectual remedies of crime is attributed to traditional prejudice. Time was when the rod was supreme and penal law was dominated by the idea of taming human passions. But it is perceived that "force is always a bad remedy for force. In the Middle Ages, when punishments were brutal, crimes were equally savage ; and society in demoralising rivalry with the atrocity of criminals, laboured in a vicious circle. Now, in the lower social grades, the brutal man who often resorts to violence is in his turn equally the victim of violence ; so that, amongst criminals,

a scar is somewhat of a professional distinction".<sup>1</sup> It is increasingly being realised 'that considering the anthropological, physical and social factors of crime punishment can exert but a slight influence on it. As Enrico Ferri puts it, "Punishment, in fact, by its special effect as a legal deterrent, acting as a psychological motive, will clearly be unable to neutralise the constant and hereditary action of climate, customs, increase of population, agricultural production, economic and political crises which statistics invariably exhibit as the most potent factors of the growth or diminution of criminality".<sup>2</sup> Ferri sums up his criticism by saying that "punishment which has professed to be such a simple and powerful remedy against all the factors of crime is therefore a panacea whose potency is far beneath its reputation."<sup>3</sup> Repressive remedies, however, have still kept their hold on men, as they are easy to administer. An instance in point is solitary confinement. Years of experience have established beyond any doubt that it exercises a terribly baneful effect on the person who is subjected to it. Nevertheless it still continues, one reason for its continuance being that it is one of the most easy-going methods for handling an intractable or difficult prisoner. Thus the system of repressive punishment has a tendency to demoralise those who are responsible for inflicting and administering them and thereby to secure its own permanency at the expense of the welfare of individuals as well as of society.

What then is the object of punishment? Once the idea of retributive or intimidative punishment is understood in its true implications, once the fallacy of viewing punishment as merely a repressive function of society is clearly apprehended, the road is made ready for transition to the next stage of thought.

#### REFORMATION THE OBJECT OF PUNISHMENT:

##### INDIVIDUALISATION THE METHOD

The next step is to get away from the rigidity of classical thought, which views the offender as only a unit, and to treat him as a person. This leads to a definite departure in the mode of administration of punishment. Every punishment is individualised, *i.e.*, adapted to the personality of the offender. This implies an entire change of objective, the aim is not merely to impose afflictive punishment upon the offender but to rehabilitate him, and to effect his ultimate reformation. Every step is calculated to bring about that supreme end. The reformation of the offender is regarded as the most effective deterrent, in other words the most successful method of preventing repetition of the offence. It follows as a corollary that a necessary condition for the

<sup>1</sup> *Criminal Sociology* by Enrico Ferri, p. 108—D. Appleton & Co., 1915.

<sup>2</sup> *Ibid.*, p. 92.

<sup>3</sup> *Ibid.*, p. 93.

success of reformatory methods is a proper classification of prisoners. The same class of methods cannot apply to all. The character and quality of the methods must vary with the character and quality of the crime and the criminal—often more of the criminal than of the crime committed by him. It becomes, therefore, of the greatest moment to have different prisons or different institutions for the treatment of different classes of offenders. For punishment is now divested of its character as a retaliatory measure, and is converted into a treatment for effecting reformation, as far as possible, of the criminal by adapting the punishment to the individuality of the offender. Since it is not always possible for the judiciary or the legislature to do so, for the reasons above stated, it may be done administratively during the term of sentence by the authorities in charge of execution of the punishment. This aspect of the problem of individualisation has been called the “administrative realisation” of individualisation, as distinguished from the legislative and judicial realisation already dealt with.

#### CLASSIFICATION.

Apart from idiosyncracies or special variations, the inmates of the prisons fall into several natural divisions, such as first offenders, habitual offenders, women offenders, adolescent offenders, child offenders, mentally defective offenders, and undertrials. At one time, even in the most civilised countries, all these used to be huddled together in the same prison without any distinction, and without any observance of privacy, decorum, or moral propriety. The conditions in which they lived were well calculated to dull all vestiges of fine susceptibility that might still remain in them. The change of objective mentioned above brought about a complete change of methods. At present, these reformatory methods are in full progress in the western countries and, by dint of practical experience, penal reformers are daily improving them, and finding out new avenues for extensive and intensive work of reform. But a further step has still to be taken. It is not only raising the one that has fallen that must engage the attention of the penalist, or criminologist, but he must look forward to ways and means for preventing the fellow members of society from going the downward path.

A special class of prisoners calls for separate treatment. It consists of the so-called political prisoners. Where it is a case of mere opinion, *i.e.*, of holding political views not in conformity with those held by the majority, it can with scant justification be the ground for afflictive punishment. It is hoped that those days are gone long past when a man became a fit subject of punishment for entertaining heretical opinion. Informed and enlightened administrators of modern times deprecate the penalising of intellectual, scientific, political, or



religious heresy. It may, however, be said that political heresy sometimes assumes a form that can justly be regarded as dangerous to society. In such cases, State expediency may require that persons holding such views should be prevented from disseminating them, and contaminating others. One of the ways of effecting this purpose is to segregate them by imprisonment. Assuming that the State is justified, in certain special cases, so to segregate political heretics, the question arises whether the treatment to be accorded to them is to be of the same kind as that of the others. There are obvious reasons why there should be differential treatment of these prisoners. More often than not they are characterised by high patriotic ideals, and altruism; and by a keen sense of self-respect which is only equalled by their spirit of self-sacrifice. Allowing for differences of quality between man and man, these characteristics are found in greater or lesser measure in all political offenders. Hence the necessity for special treatment, unless they are guilty of crimes involving moral turpitude. No doubt an element of difficulty is introduced when in addition to holding heterodox political views, the offender in question resorts to crimes in execution of his political ideal, such as, robbery, dacoity, murder, in order to carry out, as he thinks, his patriotic ambition. Such a case can be distinguished from the purely political case, and can be treated on its own footing with reference to the crime committed. The person imprisoned for purely political reasons forms a class by himself. In regard to him, there is wide divergence observable between theory and practice. In theory, modern opinion is uniform that he is not a fit subject for afflictive punishment. In practice, however, it is found, in many civilised countries that the rule is honoured by its breach rather than by its observance. It is hardly necessary to illustrate this proposition. One has only to look around and contemplate the events which are happening every day both in the Old and the New Worlds, and the conviction is irresistible that opinion is being subjected to afflictive punishment, with consequent loss not only to the individual concerned, but also to society as a whole. For, it must be remembered, that opinions change, and what is heresy to-day may be virtue to-morrow.

#### THE POSITIVE SCHOOL.

The highest aim of penology must be to improvise methods for *défense sociale*, in other words for the health and well-being of society as a whole. This is the contribution to penology of the Positive School of which Cesare Lombroso may well be called the founder, though many who have followed him, such as Enrico Ferri, Raffaele Garofalo and others have considerably enriched its thought. Thus side by side with the reformative idea there has come into penology

through the Positive School a new orientation inducing a wider and deeper study of the causes and conditions of crime viewed dispassionately as an anti-social act. This ever-widening investigation calls into requisition various branches of knowledge such as economics, biology, anthropology, sociology, physiology, psychology, psychiatry, mental pathology and so forth—sciences that influence, directly or indirectly, individual human activity and social life as a whole. Call this branch of investigation criminology, or what you will, it cannot be denied that it emerges out of the problems of penology. Viewed in this light criminology has been rightly described as a secondary evolutionary consciousness of the study of penology.<sup>1</sup> Indeed, it forms an essential part of penology. For the individual offender has no existence apart from the moral, social and economic environment in which he lives, moves and has his being. Nor can he escape the effect of his physical and mental heritage. "Individual, physical, and social factors,—heaven and earth, as Goethe would say,—have determined the birth of the offender and of the modern school of criminal law." So says Bernaldo de Quiros<sup>2</sup>, referring to the newly developed Positive School. It recognises that all the various factors above mentioned act and react on the individual and determine his individuality from which flows his conduct. If, therefore, the individual has to be held responsible as the determining cause of his actions, society must be held no less responsible as the *causa causans*. To reform a wrong-doer is but touching the fringe of the problem. The true aim is to go to the root and remove as far as possible the conditions that produce or promote wrong-doing.

This opens up a new vista. Thus the inquiry into the methods of reformation leads to the inquiry into the causes of wrong-doing—the etiology of crime. This in turn leads to another sphere of inquiry dealing with the prevention or prophylaxis of crime. The aim and object of the new penology is comprehensive and is expressed to be *défense sociale*. How does this conception of social defence represent an advance? The idea, it may be said, of defence, or protection, of society from the attacks of anti-socials is as old as penology itself, and it finds expression, in the literature of most countries. But there is a fundamental difference between the protection of society as it was formerly understood and *défense sociale* as it is understood by modern penology. The former rests on the aggressive attitude of criminal science which believes in law as the weapon of defence to fight the anti-social, to bring him to book and also perhaps to secure reparation; while the latter stands for *l'hygiène preventive* and believes

<sup>1</sup> See *supra*, p. 3.

<sup>2</sup> *Modern Theories of Criminality*, Sec. 5, p. 10. The Modern Criminal Science Series—Little Brown & Co.

in a constructive programme of social hygiene, and a scientific handling of vital social problems from the psychological, educational and economic viewpoints, with the object that anti-social germs may no longer live and thrive in the social organism. In this connection I may be permitted to quote what I have said elsewhere<sup>1</sup>:

As an illustration of the ordinary meaning which, in the last century, was attributed to the phrase 'defence of society', there is the report of the International Committee (representative of twenty nations) at the London Congress of 1872 on the question of moral regeneration of the prisoner: "Recognising as the fundamental fact that the protection of society is the object for which penal codes exist and the treatment of criminals is devised, the Committee believes that this protection is not only consistent with but absolutely demands the enunciation of the principle that the moral regeneration of the prisoner should be the primary aim of prison discipline." As Sir Evelyn Ruggles-Brise points out. "The congressists of 1872 did not say that reformation should be the primary aim of punishment, but only of prison discipline. This is quite a different thing."

There are two points which the report of the International Committee illustrates. First, even as late as the year 1872, the reformatory idea of punishment was but imperfectly apprehended, reformation being regarded as beyond the purview of the legislature and the judiciary and confined to the administrative or executive sphere. Secondly, the 'defence of society', as it was apprehended in the nineteenth century is quite a different thing from *défense sociale* of the twentieth century.

#### MEASURES OF SAFETY.

The result is that under the influence of the positive school the conviction is daily growing that mere punishment, even though corrective, is not enough for penal science. There must be measures of safety, running parallel to punishments. This new idea of measures of safety supplementing punishments, though comparatively new to penology, has come to stay. It has already found its way into the statute books of certain countries of the West and into the institutional programme of others. The attitude which the new objective induces is not only to look dispassionately on crime as an anti-social act and to individualise the treatment to be accorded to the offender with a view to stamp out the anti-social tendency in him; but further to provide preventive measures in the shape of legislation, institutions and opportunities, whereby citizens may effectively be prevented from becoming anti-social, in other words to promote *l'hygiène preventive*.

<sup>1</sup> From *Punishment to Prevention*, pp. 31-32—Oxford University Press, 1932

The growing consciousness in the western countries during the last fifty years, that punishment *qua* punishment is but a poor measure of safety for the State, has found expression in various ways. Penological and anthropological societies through their accredited organs have systematically combated the old classical or neo-classical view and have urged the adoption of measures of safety, either in place of punishments or to supplement punishments. The course that the growth of this idea has taken appears clearly from the proceedings of various congresses held from time to time in different countries. It cannot be doubted that the movement has largely been inspired and influenced by prominent members of the (Italian) positivist school of penology such as Enrico Ferri and the like. But other thinkers have also contributed their share, prominent among them being the members of the French school led by men of the stamp of Tarde, Saleilles, Fouillée, Garraud etc. Nor must we forget the part played by the so-called school of 'Reformers' headed by Liszt, Prins and Van Hamel. The result of all this ferment in the Continent was a large number of legislative projects seeking to visualise the idea of punishment as an afflictive deterrent, *supplemented* by other 'measures', juridically recognised as instruments of defensive reaction of society against crimes. The fundamental basis of these legislative projects is the belief in the reformation of the criminal as the main instrument of social defence. Punishment in the classical sense, though not by itself sufficient for social defence, is conserved but sought to be rendered more efficacious by measures of safety. A more thorough-going scheme of legislation seeking not to supplement but to *supplant* punishment by measures of safety was that of Enrico Ferri's (1921). But seeing that the time was not ripe for such an out-and-out enactment he gave his approval to the later scheme (1927) prepared by Alfred Rocco, Keeper of the Seals and Minister of Justice of Italy. In this piece of enactment punishment and measures of safety are given their respective places as parallel agencies of defensive reaction.\* Of the other continental projects may be mentioned the Greek, the German, the Czechoslovakian, the Spanish, the Polish and the Swiss.

#### SCHEME OF THE LECTURES.

The above legislative projects, along with the Soviet Russian Code which possesses some special characteristics, will be dealt with in Lecture VIII. The movement of thought and the activities of the various Associations, Conferences and Congresses that led the way to

\*Enacted 19th October 1930 and put in force from July 1st 1931.

such legislative schemes will be dealt with in Lecture IV. Prominent among these is the Congress at Brussels in 1926 of the *Association internationale de droit penal* which put its seal of approval on a compromise to the effect that, for the present, punishment in the classical sense may be retained but that in appropriate cases measures of safety and not punishments should be the rule. This was done in wise recognition of the state of public opinion which was still convinced of the expediency of retaining punishment as an afflictive deterrent for the sake of social defence.

As a background for Lecture IV and Lecture VIII, it is necessary to make a careful study of the history of crimes and punishments in various parts of the world, as also of the various theories and systems of thought that have prevailed in different epochs, particularly in the eighteenth and nineteenth centuries. This will be the subject-matter of Lectures II and III.

Lectures IX, X, XI and XII will deal with the characteristically different route which the progress of thought in penology has pursued in England and America. The genius of the Continental countries led to the growth of speculative theories in the first instance, thence to legislation in pursuance of those theories, thence to judicial and administrative individualisation. In England and America, on the other hand, voluntary efforts at reformation of offenders, or prospective offenders, first made their appearance. The institutional efforts at reform proceeded up to a certain point when it was felt that it was necessary to invoke the help of the legislature before individualisation could advance further, or could effectively be carried out. It was at this stage that legislation stepped in. The earliest enactments were in regard to first offenders, children and young persons. In course of time it came to be felt that the critical years of adolescence demanded special attention, in as much as most of the prison population begin their criminal career during that period of life. It was with this object in view that a series of enactments was passed in this century to combat adolescent criminality. The Prevention of Crimes Act, the Criminal Justice Administration Acts, the Children's Acts, the Mental Deficiency Acts, and various other Statutes amending or repealing previous law are dealt with in Lectures IX, X and XI. The picture is not complete until we consider, along with the legislation, the institutional efforts which heralded it. The Industrial Schools, the Borstal, the Elmira Reformatory, the Juvenile Courts, the Probation System, and the Parole system, to mention only a few of the many agencies at work, furnish the background for legislative and judicial individualisation in England, which has taken long years to come. One of the most

important agencies that have helped individualisation is the system of Indeterminate Sentence which will be dealt with, in particular, in Lecture X.

With the dawning sense of the efficacy of humane methods of criminal administration there has been of late an awakening of consciousness regarding the duties that society owes to the feeble-minded. Mental infirmity was, until recent times, hardly any ground for differential treatment in prison. All prisoners were treated alike and with equal inhumanity. It did not matter whether a particular individual was by reason of his mental condition irresponsible or all but irresponsible. This was the situation after conviction. Even before conviction, the fact of his insanity, as a plea in defence, would not carry him very far. Of the various shades and grades of mental infirmity only one particular aspect—and that a very narrow one—was covered by law. But even those whose cases were so covered by the law of the land were not immune from imprisonment as criminal lunatics. The obvious consequence of this was that a large number of people were sent to prison and treated exactly in the same way as ordinary prisoners, without any hope of cure or redemption. The legislative enactments bearing on this subject will be dealt with in Lecture XI.

Lecture XII will deal with the Criminal Justice Bill of 1938, one of the most comprehensive attempts at penal reform of recent times. Owing to the exigencies of the present war, the Bill, after its second reading, had to be dropped; but as it visualises fundamental reforms in essential matters a study of the main provisions will repay perusal. Apart from this, Lecture XII will deal with the Death Penalty, which has been an outstanding problem from the most ancient times, and is even now awaiting satisfactory solution.

It is a refreshing change to turn to penal science as it was in Hindu India. This will be dealt with in Lectures V, VI and VII. While the science of penology is a recent growth in the West, it is interesting to contemplate that as far back as the fourth century B.C. it was a fully developed subject of study and state-craft in India. Beginning from the Mahābhārata and ending with the seventeenth century A.D. we find a long series of authoritative writers, commentators, and compilers who have left a literature rich in its content and prophetic in its vision. *Danḍanīti* (penal science) is, therefore, not a recent growth in India. It is as old as the *Srutis*. Its scope is comprehensive, its province clear and defined, its rules of individualisation worked out in great detail, and with scientific precision. The fundamental basis of *danḍanīti* is deterrence and mental re-habilitation. There is no savour of retribution

or vengeance. In these respects it presents a remarkable contrast to the prevalent theories of punishment in the West up to recent times. I do not presume to have dealt with the Hindu system exhaustively. It is not possible to do so in the course of a few lectures. But I trust the materials presented in the three lectures will suffice to show that there is a wide field of research yet unexplored and that it will amply repay the student of penology to study the principles which our far-seeing forefathers acted upon.

## LECTURE II

### CRIME AND PUNISHMENT

The history of the development of crime and punishment is of compelling interest. It goes back to pre-historic times. It is not the purpose of this lecture to give a complete history of crime, or of punishment. Volumes have been written upon it and the literature on the subject is replete with information. In order, however, to consider the scope and object of penology, as it is at present, it is necessary to go back at least a few centuries and to trace the history of crime, as also of punishment. With the gradual progress of ideas a number of theories of crime and punishment have also evolved in the course of the last two centuries. These theories which will be considered in a later lecture\* require for their background the history of development of the two concepts—Crime and Punishment.

#### THE BASIC IDEA OF CRIME.

Jurists of recent times have found considerable difficulty in defining crime. In what respect does it differ from a breach of civil law? The difficulty arises from the fact that in all early law both in Eastern and Western countries there was little distinction between sins, moral wrongs, breaches of secular law and breaches of custom; nor was any distinction observed between what is now understood to be two different classes of wrongs known as private and public.

Coming to later times, we find Serjeant Stephen in his edition of the Commentaries of Blackstone thus laying down the definition of crime: "A crime is a violation of right considered in reference to the evil tendency of such violation as regards the community at large". It has been observed that this definition lacks one of the features pointed out by Blackstone himself who defines crime as "a violation of the public rights *and duties* due to the whole community, considered as a community". There can be no doubt that a crime may be a violation either of a right or of a duty. Indeed, a great many of the breaches of criminal law are breaches of duty to abstain from objectionable acts and they may not involve infringement of any one's right. It is clear that the injury to the community which marks the general tendency of all crimes may serve roughly to describe crime, not to define it. Sometimes a crime by law is a lesser evil than a non-criminal wrong in relation to the same subject. Again, even when this evil public tendency is recognised an act may still be regarded by law

• \*Lecture III.



as non-criminal. Nor does it serve any useful purpose to define crime as a wrong that revolts against moral feelings. True, this factor of moral repulsion is often present in the ordinary estimate of a crime, but that is no reason why it should form the basis of definition. The fact is we must look to history in order to account for the application of the word public wrong to crimes. It was the Roman jurists who noted the specially strong tendency of crimes to injure the public, and the notion of English law that crimes are to be regarded as pre-eminently public wrongs is traceable to Roman influence. Prof. Kenny observes:

In early Rome all charges of crime were tried by the public itself *i.e.*, by the whole Roman people assembled in *centuriata*. Long after this form of trial had become obsolete, and the origin of the epithet consequently obscured, crimes still continued to be called 'public'. And the phrase did not die out with Roman law; but, as we have seen, plays a prominent part in the classifications and the definitions of our own Blackstone. Its survival was doubtless due to the recognition of the unmistakable public mischief which most crimes produce.<sup>1</sup>

#### EARLY GERMANIC IDEA OF PUNISHMENT.

In the early Germanic systems, broadly speaking, the basis of punishment is vengeance. There is another idea that often expresses itself and that is the idea of elimination of the offender from society. This latter is found not only in the Germanic systems but in all ancient systems. Perhaps it also lies at the root of the death penalty. The elimination was effected in the ancient systems by exile or outlawry and in its more modern form by banishment. Early systems of law are also replete with instances of infamous punishments calculated to isolate the offender; in effect, it operated as a form of banishment or, at any rate, produced a like result by placing social distance between the offender and the non-offending individuals of the society. Speaking of the law of England on the eve of the Norman conquest, Prof. Maitland draws attention to four elements, which deserve attention and says:

We have to speak of outlawry, of the blood-feud, of the tariffs of *wer* and *bot* and *wile*, of punishment of life and limb. As regards the malefactor, the community may assume one of four attitudes; it may make war upon him, it may leave him exposed to the vengeance of those whom he has wronged, it may suffer him to make atonement, it may inflict on him a determinate punishment, death, mutilation, or the like.<sup>2</sup>

Outlawry was based on the principle that, should a man violate the law, the proper way for the outraged society to deal with him was to put him outside the pale of law and to make war with him. He who

<sup>1</sup> Kenny, *Outlines of Criminal Law* pp. 5 and 6—Cambridge University Press 1902.

<sup>2</sup> Pollock and Maitland, *History of English Law*,

broke the law made war with the community and, therefore, it was open to the community to make war with him—he was out-law. He was no longer entitled to any protection; he could be pursued and hunted down like a wild beast. His properties could be pillaged and plundered and his body sacrificed at the altar of the community. Very often, one finds in the history of the earlier communities, this conception of sacrifice appearing side by side with outlawry. A survival of the spirit of outlawry is to be found up to the nineteenth century in the King's right to 'year, day and waste' of the felon's land. The second attitude resulted in the systems of *wer* and blood-feud, of *bot* and *wite*. It represents the spirit of vengeance propitiating itself through retaliatory acts by the kith and kin of the aggrieved against the offender. If a man was killed, the offender would be given over to the kinsfolk of the slain to be dealt with in any way they chose, and they could avenge themselves not only by killing the offender but by pillaging, plundering and destroying his possessions. Nor was this all. All lives were not deemed to be equal. The status of the slain and the slayer would determine whether only one life or more lives of the slayer's kin would make up for the loss of the slain. "Six ceorls must perish to balance the life of one thegn".<sup>1</sup> There is some dispute whether blood-feuds were matters of legal right, or mere lawless law. According to some the slayer and his kinsfolk were required, in the first instance, to pay the dead *werigild*, i.e., the sum which was fixed by law, as realisable from them as and by way of atonement, for the offence committed. According to others blood-feud was the original way of atonement, and it was only later that the law fixed a specific sum that could be paid as an alternative with the option to the aggrieved party, either to take money, or to take blood. Whatever may be the correct view, the fact remains that the blood-feud existed as one of the recognised means of making amends for the wrong done.

The next step is indicated by the system of *bot* and *wite*. *Bot* means a compensation to be paid to the injured party, and *wite*, a payment to be made to the King. There was an elaborate tariff of prices—*bots* or *wite*—set upon all manner of offences great or small, and when the offender was unable to pay he was doomed to outlawry. Thus homicide, unless of a specially aggravating kind, became "emendable"; the *bot* for homicide was the *werigild* of the slain.

#### THE KING'S PEACE.

There is intimate connection in English history between these early forms of punishment, and the doctrine of the King's peace. In Bracton's time the invariable preamble to every accusation of grave

<sup>1</sup> Pollock and Maitland, *History of English Law*.

wrong ran thus:—"The said A was in the peace of God, and of our lord the King, and there came the said B with force and arms, etc." This idea of "the peace of our lord the King" was slowly worked out. At first every house had its own peace and so had every Church. There was a peace for each township and a peace for each of the four great roads. If the peace of a man's house was broken, a *bot* must be paid. So too if lord's peace was broken in his manor. The next step was to treat the King's peace as independent. If the King was dining in A's house, and B broke the peace, a *bot* must have to be paid to A, and a fine to the King. The King's peace was more extensive than that of others. The border countries were in his peace, as Counties Palatine, because he had a peace there. Gradually the idea emerged that any place not specially under any other peace, was in the King's peace. Finally, the King's peace absorbed all other peace, and became an all-embracing atmosphere. The notion that "the King never dies" and "the throne is never vacant", gave continuity to the King's peace, and a new meaning to the allegation "against the King's peace" in every indictment. The King now became equivalent to the State, and "against the King's peace" began to imply that the wrong was against the State—a public wrong. Henceforth the expression "against the King's peace" was confined to these cases of wrongs only, *i.e.*, to Crimes, as distinguished from Torts.

To return to the main topic, the tariff of *bot*, *wer* and *wite*, in course of time became very elaborate: "In the simplest case, there is the *wer* of the slain, varying with his rank, to be paid to his kin; there is the man's *bot* to his lord, and this varies with the lord's rank; there is the *wite* to be paid to the King or some lord who has regalia".

#### COLLECTIVE RESPONSIBILITY: FRANKPLEDGE.

Another example of collective responsibility for wrong done is found in the English frankpledge, *i.e.*, the union of men in tens, each group being responsible for its members. The very English term "murder" testifies to this principle of collective responsibility, in as much as originally it meant the fine paid by the hundred when a man was killed. The principle of vengeance was not restricted to animate nature. It applied even to inanimate things that had done harm, specially those that caused death. The law knew no such things as an accident. A is brewing beer. In his absence C's child comes in, stands by the kettle which slips, and the liquid burns the child so that it dies. The relatives pursue A, who flies to B's house. An affray ensues, and B chances to kill his own nephew. A becomes liable for the death of the child, and B for the death of his nephew. Again A's sword is

hanging in B's house, C knocks the sword, so that it injures D. A is liable, for his sword did the harm. If a man is lopping a tree, and a bough falls on him so that he dies, the tree must be cut down. If he falls into a well, and is killed, the well must be filled up. Such was the law. As a result of the combination of the principle of vengeance, with that of compensation traced above, there emerged the English law of *deodand* which required the animate or inanimate thing causing the death of a human being to be delivered to the King for being put to pious uses "for the appeasing of God's wrath". The *deodand* was also called the *bane*, i.e., the slayer. Even Bracton testifies to the existence of this practice with approval: "If a man by misadventure is crushed or drowned or otherwise slain, let hue and cry at once be raised ; but in such a case there is no need to make pursuit from field to field and vill to vill ; for the malefactor has been caught, to wit, the bane".

#### DEODAND.

The following interesting account of the law relating to *Deodand* is given by Hawkins:¹

\*\*\* it may not be improper to consider the killing of a man merely *per infortunium*, occasioned by some animal or thing without life, without the default or procurement of another man ; as where one is killed by a fall from an horse or cart, etc., which though it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder ; and the unhappy instrument or occasion of such death is called a *Deodand*, and is forfeited to the King, in order to be disposed of in *pious uses* by the King's Almoner ; as also are all such weapons whereby one man kills another.

It seems clearly settled, that a horse, etc., killing an infant within the age of discretion ; are as much forfeited as if he were of age ; but formerly it was holden, that a horse or cart, *by a fall from* which an infant was slain, were not forfeited ; perhaps for this reason ; (1) because the misfortune might rather seem owing to the indiscretion of the infant than to any default in the horse, etc. But this distinction has not been allowed of late ; for the law does not ground the forfeiture on any default in the things forfeited, since it extends it to things without life, to which it is plain that no manner of fault can be imputed.

Also, by the opinion of our ancient authors, things fixed to a *freehold*, as the wheel of a mill, a bell hanging in a steeple, etc., may be deodands ; but by the latter resolutions they cannot unless they were severed before the accident happened. \* \* \* \*  
\* \* \* Where a thing not in motion causes a man's death, that part thereof only which is the immediate cause is forfeited. As

¹ Hawkins's *Pleas of the Crown*, Chapter VIII—3-7.

where one climbing upon the wheel of a cart while it stands still, falls from it and dies of the fall, the wheel only is forfeited: but if he had been killed by a bruise, from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater. \* \* \*

In all these cases, if the party wounded die not of his wound within a *year and a day* after he receiveth, there shall be nothing forfeited, for the law does not look on such a wound as the cause of the man's death, after which he lived so long; but if the party die within that time the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the meantime.

Of the four attitudes to which Prof. Maitland has referred there remains only the fourth one to be dealt with, namely, determinate punishment of an afflictive character to be meted out by the King. He could order the life of the offender to be taken, and dictate the kind of death that was to be inflicted on the offender; he could order mutilation such as loss of hand or foot, or any other limb; or he could insist upon banishment or forfeiture of chattels. Many were the forms of mutilation that came into vogue at different times. Gradually, all these four forms of punishment disappeared, and gave place to a few definite forms. Certain crimes placed the life and limb of the offender in the King's mercy; certain others were punished chiefly by money penalties which took the place of the *wites*; while the old *bot* gave way to 'damages'; and the rest were dealt with by specific punishments of various descriptions considered to be appropriate to particular offences. It was left to the whims and caprices of kings or tyrants to improvise the most ingenious and the cruellest of methods for inflicting punishments of various kinds. Among the modes of taking human life which were developed in the course of centuries by rulers and conquerors, both in the eastern and the western countries, may be mentioned burning, beheading, hanging, drawing and quartering, breaking on the wheel, drowning, stoning, flaying alive, sawing asunder, crushing beneath wheels or the feet of elephants or other animals, throwing to the wild beasts, throwing into the arena for compulsory combat, burying alive, boiling, impaling, pressing, piercing with javelins, shooting with arrows or any other missiles, starving, poisoning, crucifying, strangulating, suffocating, pouring molten lead through the mouth, etc. Even this long list does not exhaust the different varieties or sub-varieties which were introduced as the stomach for cruelty of the punishing authority would dictate. The history of the middle ages is darkened with the record of most barbarous punishments inflicted upon men and women for the mere crime of holding an opinion or a religious faith contrary to those of their countrymen, or of their contemporaries. Hundreds and thousands,

were done to death from amongst the most estimable and outstanding characters of human history. The history of the Inquisition is associated with nameless forms of torture which seemed to be ever on the increase in point of number and intensity. It must, however, be remembered that most of the cruelties perpetrated by the Inquisition were not actuated by the object of imposing punishments but by the still less justifiable object of extracting a confession or a declaration of faith, which was considered to be a worthy object for all forms of torture and cruelty.

The tyrants that let themselves loose on the people were not only kings and rulers of the land, but the lords and nobles on the one hand, and the clergy on the other, both of whom had developed into separate powers, or estates, in the realm. The arbitrariness of the various forms of persecution, in which they indulged, in the name of punishment, became a scandal. Matters came to a crisis, and in the year 1789 came the Declaration of the Rights of Man and of the Citizen by the Constituent Assembly of the French Revolution which may be said to mark the beginning of an orderly and methodical system of punishments based on the principle that "the right to punish is limited by the law of necessity". This put an end to the autocratic punishments of the 'Ancien Régime'.

#### A NEW ERA.

The Declaration of the Rights of Man, and the Decree of January 21, 1790 represent the beginning of a new chapter. Only acts resulting in measurable injury to society were declared punishable, and not so-called wrongs consisting only in intent. Further, the law was authorised to establish only such penalties as were strictly necessary. The principle that intention alone without actual injury could not constitute crime was echoed, at the end of the Middle Ages by Brian C. J., in words that have since remained a motto for legislators and jurists: "The thought of man shall not be tried, for the devil himself knoweth not the thought of man". In other words, law cannot go behind the tangible, provable fact that an act has resulted in actual harm to society. So also Hale<sup>1</sup> observes, speaking of witchcraft: "It cannot come under the judgment of felony because no external act of violence was offered whereof the common law can take notice, and secret things belong to God". Thereafter came the Declaration by the Revolutionary Assembly in 1791 that penalties should be proportioned to the crimes for which they are inflicted, and that they are intended not merely to punish, but to reform the culprit. Here, for the first time in Europe, we come across a definite public

<sup>1</sup> Hale's *Pleas of the Crown*, p. 429.

declaration of the corrective principle of punishment. Not that this principle was altogether absent from the penal field. We shall have occasion later on to advert to the manner in which it figured in the ecclesiastical forms of punishments, but there it was mixed up with the religious notions of penance or cleansing of the soul. Apart, however, from the reformatory idea, the great service which the declaration of the Revolutionary Assembly rendered was to make punishment definite, a specific punishment answering to a specific offence. Penalties were proportioned to the offences and were divided into three classes: corporal and infamous, correctional and municipal, corresponding to the grades of offence and also to the court, *i.e.*, the criminal court, consisting of judge and jury, the correctional court, consisting of the justice of the peace and two assessors, and the municipal court with three judges chosen by the municipal officers, and from amongst themselves. The penalties prescribed by the Code of September 25, 1791 were neither perpetual, nor atrocious, nor arbitrary. The infliction of the death penalty was limited to decapitation by the guillotine (March 20, 1792). Thus by one sweep all the gruesome forms of mutilation and torture as also civil death and general confiscation became illegal. The repulsion from arbitrary punishment was so great that fixed penalties were prescribed which the judges were bound to follow, without being at liberty to pay any regard to aggravating or extenuating circumstances.

#### RISE OF THE CLASSICAL SCHOOL.

This may be regarded as the turning-point of the old conception of punishment, and the starting-point of the so-called classical school of penology. In the last lecture, I dwelt on the extreme rigidity of the classical school of thought which precluded any consideration of the individual circumstances of each case, making for aggravation or extenuation of the offence. From what has been said above it will now be realised that it came as an inevitable reaction against the uncertainty and arbitrariness of the period that had gone before. It must be recognised that it had its own characteristic value and efficacy. Its drawback lay in its inflexibility. There were forces at work which contributed to its rigidity. One of the most important of these was the then widely credited theory of free will. Every man, according to that theory, is the author of his own actions, and must be held to be fully responsible for them. At the moment when two alternative courses of conduct appear before him, he has the inherent God-given power to choose the right and to eschew the wrong. If he chooses the latter he has to thank himself for it, and must pay the penalty which the law prescribes for the breach. Into this high-sounding

doctrine of responsibility, aggravating or extenuating circumstances do not enter ; individualisation finds no place.

### LEX TALLIONIS: POETIC PENALTIES.

Whatever may be said against the classical school, it is essential to appreciate the primordial bases of the principle of equality of punishments in the eye of law, and of the parallelism between punishments and offences. In the last analysis it is based on the *lex tallionis*. The way in which this expresses itself in the Mosaic law is well known: "Thou shalt give life for life, eye for eye, tooth for tooth, foot for foot, burning for burning, wound for wound, and stripe for stripe." It does seem harsh to modern ears. But based as it is on the law of vengeance or retaliation it has, underlying it, the idea of equality which, while endeavouring to embody the sentiment of justice, dictates that the suffering caused by the offence must be administered to the offender in equal measure. Here we find the two most powerful ideas that have influenced penology from the most ancient times, namely, equality of punishment for all *and* equality, in point of suffering caused, between the crime and the punishment. This craving for equality has gone so far that all manner of 'characteristic' punishments which have ironically been called "poetic penalties," have been invented by man to satisfy this idea. Here is a list of only some of them taken from Hammurabi's Code: "If a man has caused the loss of a patrician's eye, his eye one shall cause to be lost. If he has shattered a patrician's limb, one shall shatter his limb. If a man has made the tooth of a man that is his equal fall out, one shall make his tooth fall out." In some cases this is carried out in a way that appears ridiculous. "If a man kills another by falling from a tree upon him, he shall be killed by one of the relations of the deceased, falling out of a tree upon him." Other 'characteristic' punishments are conceived under the influence of the same impulse for equality, such as piercing the tongue of the blasphemer, the false accuser, or the perjurer, castration of the ravisher, the scold's or gossip's bridle for the shrew or the tell-tale, and so on. The list could be multiplied. But enough has been said to show how this principle of equality led men away from the real object of punishment. In ancient India, one witnesses the peculiar spectacle that side by side with a most scientific conception of penology, and of individualisation of punishment, there is a long list of punishments of the primitive type, comprised of capital sentence of various kinds, imprisonment, as also the so-called 'characteristic' penalties.

Turning to Aristotle we find the idea of justice and equality discussed along with the idea of correction in a manner which will repay perusal. He observes:



But the 'just' which arises in transaction between men is fairness in a certain sense, and the 'unjust' unfair, only not in the way of geometrical proportion but of arithmetical. Because it makes no difference whether a robbery, for instance, is committed by a good man on a bad, or a bad man on a good, nor whether a good or bad man has committed adultery: The law looks only to the difference created by the injury, and treats the men as previously equal, where the one does, and the other suffers, injury. Or the one has done, and the other suffered, harm. And so this unjust being an inequality, the judge endeavours to restore to equality again, because really when the one party has been wounded, and the other has struck him, or the one kills and the other dies, the suffering and the doing are divided into unequal shares; well, the judge tries to restore equality by penalty, thereby taking from the gain.

For these terms gain and loss are applied to these cases, though perhaps the term in some particular instance may not be strictly proper, as gain, for instance, to the man who has given a blow, and loss to him who has received it; still, when the suffering has been estimated the one is called loss, and the other gain.

And so the equal is a mean between the more and the less, which represent gain and loss in contrary ways (I mean, that the more of good and the less of evil is gain, the less of good and the more of evil is loss): between which the equal was stated to be a mean, which equal we say is 'just': and so the corrective just must be the mean between loss and gain.

It will be noticed that the 'corrective just', referred to by Aristotle here has no reference whatever to the correctional, or reformative, idea as understood by modern penology. That refers to the rehabilitation or mental reformation of the offender. Aristotle obviously means by that expression a balancing of loss and gain, but he at once perceives that such equipoise is hard to achieve. He therefore adds:

There are people who have a notion that reciprocation (or retaliation) is simply just, as the Pythagoreans said; for they defined the just simply and without qualification as 'that which reciprocates with another' (i.e., an eye for an eye). But this simple reciprocation will not fit on either to the 'distributive just', or the 'corrective just' (and yet this is the interpretation they put on the Rhodamanthian rule of the just: "If a man should suffer what he hath done, then there would be straightforward justice"). for in many cases differences arise: as, for instance, suppose one in authority has struck a man, he is not to be struck in turn; or if a man has struck one in authority he must not only be struck, but punished also. And again, the voluntariness or involuntariness of actions makes a great difference.

But in dealings of exchange such a principle of justice as this reciprocation forms the bond of union; but then it must be reciprocation according to proportion and not exact equality, because by proportionate reciprocity of action the social community is held together. For either reciprocation of evil is meant, and if this be not allowed it is thought to be a servile condition of things: or

else reciprocation of good, and if this be not effected than there is no admission to participation (*i.e.*, of service) which is the very bond of their union.<sup>1</sup>

Coming to much later times, we find equally illustrious thinkers like Kant and Hegel are under the influence of the same idea. Kant speaks of "the right which the sovereign has painfully to afflict the subject by reason of a transgression of the law". Hegel takes it further and in his *Philosophy of Rights* speaks in the same strain as Aristotle: "Punishment is only the manifestation of crime, the second half which is necessarily presupposed in the first. \* \* \* "Retribution is the turning back of crime against itself. The criminal's own deed judges itself". \* \* \* "Since violence or force in its very conception destroys itself, its principle is that it must be cancelled by force". \* \* \* "Hence it is not only right, but necessary that a second exercise of force should annul and supersede the first". Again, "the criminal act is a negation, and punishment is the negation of a negation". Hegel throws his argument more or less in the form of dialectics, and argues that in as much as a crime is an act of violence on the social order, and hence an act of unreason, it can only be negated by another act of violence and unreason, *i.e.*, punishment, which he calls "the other half" pre-supposed in "the first half". It may look logically or mathematically correct, but it remains to be established that as in logic two negatives produce an affirmative, in penology two acts of unreason must produce the happy result of re-establishing reason!

The above review of the classical theory is not meant, as has already been observed, to detract from the credit that attaches to it for having produced order out of chaos, and for having put a stop to irrational and unwarranted punishments inflicted arbitrarily by the ruling authority. These and other good points will be dealt with later. But it is impossible to ignore the fact that it has brought into penology a mechanical and inflexible standard which is out of keeping with the realities of life.

#### IMPRISONMENT AS A FORM OF PUNISHMENT.

Another triumph of the Revolutionary Assembly of 1791 was to transform the character of imprisonment and to lay down that thenceforth imprisonment was itself to be a form of punishment. The object of imprisonment up to that time was merely to secure the person of the offender until he could be brought before the judges for trial, and also, after conviction, to produce him for taking his punishment. The prison was only a place of detention, not of punishment. Incidentally, however, it became a fearful engine of oppression by despotic lords

<sup>1</sup> Aristotle, *Ethica Nicomachea*, Book V. Chaps. 4-5.

and noblemen, as well as by arbitrary governments. Instead of serving as places of detention, or as aids to judicial proceedings, they were resorted to as aids to coercion and intimidation. The law was being served by punishments of a swift and cruel variety such as those dealt with above ; and arbitrary power was being served by throwing undesirables into prisons which were no better than dungeons. The horrors of the Bastille were enacted on perhaps a less dramatic scale in every one of these so-called places of detention. In England too the prisons served the same purpose, i.e., ostensibly as places of detention, and were peopled by under-trials and debtors often guilty of technical rules of law. The Magna Carta guaranteed freedom from arrest except on a criminal charge but, in clear violation of it, thousands were thrown into prison ostensibly on grounds of law but really for ulterior motives, and at a cost far exceeding the sum to be recovered from the debtors. The result was that the gaols were always full, and gaol deliveries few and far between. Even after acquittal had been ordered, it was difficult for the prisoner to get out of the clutches of gaol authorities who looked upon gaol management in the light of a commercial business for filling their pockets. For the necessities of food and drink the wretched inmates had to propitiate the gaolers or to seek charity at the hands of the benevolent. Every one, whether tried or untried, was heavily ironed. The dirt, filth and squalor, the utter dearth of light and ventilation, added to the indefinite overcrowding which went on with impunity, made the prisons of those days veritable pestiferous dens not even fit for beasts to live in. All this needed a John Howard to expose to all the world before things began slowly to move towards amelioration. It may safely be said that the state of prisons in all the civilised countries was pretty nearly the same.

It was, therefore, a service of no mean order that the Assembly rendered when it laid down that prisons were not to be utilised as places for indefinite detention by executive authorities, and that (i) imprisonment in specific forms and for specific periods were to be imposed as a recognised mode of punishment under the governance of law, (ii) putting in irons and imprisonment were no longer to be perpetual and (iii) the avowed object of imprisonment was to be the rehabilitation of the offender.

Prior to the Revolution of 1789, the latest Criminal Code of France was the Ordinance of Louis XIV passed in August 1670. A reference to it demonstrates the fact that imprisonment was not an existing form of punishment under the law. The punishments provided for therein were death, torture, the galleys (for life, or for a term), banishment (for life, or for a term), flogging, the *amende honorable* (i.e.,

public apology and reparation) and reprimand. Besides these main forms, there were other secondary forms such as branding, the *carcan* (iron collar), the pillory, confiscation, fines, etc. With the establishment of imprisonment as a recognised form of punishment, which was never to be for life, there came to be established in France a new era of penitentiary reform based upon the principle of amendment of the prisoner. The Code of 1810, which followed, contained a more enlightened provision giving to the judges the discretion to determine the duration of sentence within minimum and maximum limits. Between the maximum and minimum prescribed, the judge might vary and adjust the punishment according to the particular circumstances of each case. In the system of the Penal Code of 1791 there were no such limits prescribed. Under it punishment was absolutely fixed, as in the Salic law. There was no room for consideration by the judge of the facts and circumstances attending the deed, of circumstances of provocation, or of the antecedent circumstances leading up to the offence. The hands of the judge were tied by the law. He was a mere mechanical instrument for administering the fixed punishment laid down by law. The Code of 1810 considerably liberalised the law of 1791. It also contained a provision for the surveillance of convicts after discharge. This marked a distinct advance.<sup>1</sup>

#### REFORMATION THE PURPOSE OF PUNISHMENT.

Although it is correct to say that the end of the eighteenth century marks, as above mentioned, the advent of the idea of reform as the purpose of punishment yet there can be no doubt that long before it we find traces of the reformative idea at different places. The prison for women at Amsterdam in 1593, the prison for young prisoners built at Rome in 1704 by Pope Clement XI, and called the hospital of St. Michael, and the famous cellular prison at Ghent built by Villain XIV, all point in that direction. In fact, Villain has been called the father of modern penitentiary science, and his prison foreshadowed some of the present day methods of prison reform, such as, select prison industries, teaching the prisoners the way to earn an honest livelihood after discharge, allowing prisoners a small proportion of their earnings during imprisonment, and retaining a portion for their uses after discharge, classification of prisoners, medical and spiritual assistance and, what is most significant, power given to the prison administration to recommend for pardon and commutation of sentence in appropriate cases, as a fit reward for reform,<sup>2</sup> thus anticipating the

<sup>1</sup> See Wines, *Punishment and Reformation*.

<sup>2</sup> *Ibid.*

principle of Indeterminate Sentence, to be dealt with later.\* It will be seen in due course that these in essence are the accredited methods for rehabilitation of prisoners. Besides the above mentioned attempts at reform, there were certain outstanding personalities, whose writings contributed not a little to the development of the reformatory idea in Europe. Mirabeau's Report on Prisons did not merely describe them as *maisons d'amelioration*, but set forth principles of penal reform which must be regarded at the present day as nothing short of prophetic. The efficacy and dignity of labour, the necessity of separating the inveterate criminal from the others for avoiding contamination, the efficacy of rewards based on the 'mark' system, the usefulness of conditional licence, and the value of aid-on-discharge—all these present-day ideas were clearly anticipated and elaborated. Beccaria (1735-1794) is another personality, whom we cannot ignore. His epoch-making book *Delitti e delle Pene* ('On Crime and Punishment') exercised a profound influence. His able advocacy against capital punishment, and torture in punishments generally, went a long way to help the cause of reform, and to deal a death-blow to all manner of barbarity that had so long disgraced the administration of punishment. French philosophers and encyclopædists also leavened the thought of the eighteenth century, while the writings of Jeremy Bentham (1742-1832), the great jurist and utilitarian philosopher of England, saturated the philanthropic thought of England and the continent. Equally epoch-making was the work of John Howard who personally investigated the conditions of the prisons, and published his book *The State of Prisons in England*, which led the way to a veritable revolution in prison administration in England. Names could be multiplied such as those of Mrs. Elizabeth Fry, Sir Thomas Buxton and of the two eminent Frenchmen—J. A. de Beaumont, and A. de Tocqueville, all of whom laboured in the same field confidently awaiting the dawn of penitentiary reform.

#### SOLITARY IMPRISONMENT AS A MEANS.

The part played by the Clergy in the development of penitentiary reform deserves honourable mention. The very word 'penitentiary' is derived from the methods employed by the ecclesiastics for inducing reflection, and thereby penitence, into the mind of the wrong-doer, by putting him in isolation. With this end in view the wrong-doer was thrown into a solitary cell to practise asceticism and to make his peace with God and man. It was this idea that lay at the root of the penitentiary prisons afterwards set up by secular authorities. The solitary cell is no other than a leaf taken out of the book of the ecclesiastics. But the irony consists in this that apart from the motive to

\*Lecture X.

encourage reflection and penitence in the mind of the wrong-doer, there were other unexpressed motives that led the Church to resort to solitary seclusion. The Church had a motto that it must seek to keep clear of bloodshed—*Ecclesia abhorrent a sanguine*. It faithfully observed the motto by putting the victims to death without bloodshed, *i.e.*, by throwing them into dungeons which were significantly named *Vade in pace* 'Depart in peace.' This was a matter of common occurrence during the Inquisition. Similar nefarious practices were not uncommon within the cloister walls of monasteries all over Europe. This finds its parallel in the inscription which Edward Livingston recommended in his 'System of Penal Law for the State of Louisiana' to be inscribed on every murderer's cell. Apparently, Livingston contemplated that death penalty should be abolished and a proper substitute, sufficiently deterrent, should be found for it. The inscription runs as follows:—

In this cell is confined to pass his life in solitude and sorrow, A.B., convicted of the murder of C.D.; his food is bread of the coarsest kind, his drink is water, mingled with his tears; he is dead to the world; this cell is his grave; his existence is prolonged that he may remember his crime and repent it, and that the continuance of his punishment may deter others from the indulgence of hatred, avarice, sensuality and the passions which led to the crime he has committed. When the Almighty, in his due time, shall exercise toward him that dispensation which he himself arrogantly and wickedly usurped toward another, his body is to be dissected, and his soul will abide that judgment which Divine Justice shall decree.

Verily, Livingston has wrung these words of righteous indignation out of the hearts of the ecclesiastical chastisers!

Nevertheless, the fact remains that the idea of true penitence, with resulting correction, first made its appearance at the instance of the ecclesiastics. A typical illustration of the better view among ecclesiastics is to be found in the writings of a Benedictine of the Abbey of St. Germaine in Paris, of the time of Louis XIV:

Penitents might be secluded in cells like those of the Carthusian monks, and there employed in various sorts of labour. To each cell might be joined a little garden where, at appointed hours, they might take an airing, and cultivate the ground. They might, when assisting in public worships be placed in separate stalls. Their food should be coarse, and their fasts frequent. No visitors from the outside should be admitted; but the solitude of prisoners' lives should be unbroken, except by the visits of the Superior, or some person deputed by him to exhort and console them.<sup>1</sup>

<sup>1</sup> See *Punishment and Reformation* by Dr. Frederick Howard Wines, p. 151—(New York Thomas Y. Crowell Co.), to which I am indebted for much valuable information.

<sup>1</sup> Wines, *Punishment and Reformation* p. 149.

Here are contained the germs of cellular imprisonment with the express object of reformation. In the eighteenth century we find this idea with more or less variation echoed by non-Catholic Christian divines, and also by lay people interested in the principle of reformatory imprisonment. Bishop Butler about the middle of the eighteenth century advocated separate cells for all prisons, observing that he considered preparation for life even more important than preparation for death. Jeremy Bentham propounded his scheme for a Panopticon, or "a gigantic inspection house, a glass lantern as large as Ranelagh, with the cells on the outer circumference." The object of it was to facilitate strict observation of every inmate and to reform the prisoners by seclusion and solitude under severe inspection. The redeeming features in his scheme, however, were that he made room in it for remunerative labour for prisoners who were to share in its profits. Thomas Bray, Chairman of a Committee of Prisons appointed about the beginning of the eighteenth century wrote an 'Essay toward the Reformation of Newgate and the Other Prisons in and about London,' in which he advocated separate confinement of prisoners under sentence of death. Howard threw the weight of his support in favour of separation. He visited prisons in other countries such as Holland and Switzerland and observing the practice of separation of prisoners prevalent in those countries recommended its adoption, thus: "I wish to have so many small rooms or cabins that each criminal might sleep alone. If it be difficult to prevent their being together in the day time, they should by all means be separated at night. Solitude and silence are favourable to reflexion, and may possibly lead them to repentance." With characteristic insight he also saw the pernicious effect of absolute isolation, for he adds "it should be considered by those who are ready to commit for a long term petty offenders to absolute solitude that such a state is more than human nature can bear without the hazard of distraction or despair." One of the earliest prisons on the separate system was constructed in Gloucester under Howard's auspices. At the instance of Blackstone, Howard, and Eden (afterwards Lord Auckland), an Act of Parliament passed in 1779 set forth the object of the penitentiary system to be to seclude the criminals from their former associates, to separate those for whom hopes might be entertained from those who were desperate, to teach them useful trade, to give them religious instruction, and to provide them with recommendation to the world and the means of obtaining an honest livelihood after the expiration of the terms of their punishment. This preamble to the Act of 1779 puts within a small compass the main object of good prison discipline. The questions, however, that cried out for solution were: how the classification of the prisoners was to be effected; to what extent it could be carried out; whether it was to be by grouping or by individual isola-

tion ; and, lastly, if isolation was to be effected, whether it should be by night only, or both by day and night. The above have remained to this day the outstanding problems for the legislator, and for the prison administrator. The system of grouping has its advantages and disadvantages. The system of isolation too has its advantages, but it suffers equally, if not more, from disadvantages which we shall presently see.

In the year 1813 was commenced the construction in England of the Millbank Penitentiary. Lands were purchased for the purpose, and the penitentiary, which was opened in 1816, was placed under a distinguished governing body with the Speaker of the House of Commons as the Chairman. The principle of the new undertaking was to reform the prisoners by seclusion, as also by employment and religious instruction, and the building was, therefore, constructed on a cellular plan. Meanwhile, the legislature was busy promulgating Acts for the amelioration of prisoners. Gaol fees were abolished, chaplains were provided in prisons, and construction of improved prison accommodation after the new idea was made imperative on local authorities. In 1831 a Select Committee of the House of Commons was appointed to enquire into the problems of effective classification of prisoners, the desirability or otherwise of separate cells, and other allied questions. Just about that time two distinguished French publicists J. A. de Beaumont, and A. de Tocqueville were sent to the United States for the purpose of examining the American system of imprisonment. Their report was published in 1834, and exercised a profound influence, not only in England but on most of the continental countries. They strongly supported the cellular system introduced by the Quakers in America, and recommended their adoption. This led to the appointment in 1835 of a Select Committee of the House of Lords which entered upon a prolonged investigation and finally reported on the superior advantages of the separate system supplemented by proper arrangements as to prison labour, education, and religious ministration.

In 1842 was constructed the Pentonville Prison to house about 1,000 convicts and to serve as a model for future prisons. The structure was designed on the cellular principle which at that time was regarded as almost ideal for inducing reflection and reformation, as also for avoiding the dangers of contamination. The new prison had long corridors or "halls", each with five tiers of cells radiating like the spokes of a wheel from a central point of observation whence the officer on duty could easily keep an eye on all the sections. The idea behind the design was to provide a place where every offender might in the silence and solitude of his cell repent and atone for his past. The further principle of filling the mind of the prisoner with the desire to learn profit-



able industries so as to become self-reliant after release was just dawning on liberal-minded prison administrators. The days of useless toil with the crank, the tread-wheel and the like were not yet over; and the only human factor that could break the monotony of the prisoner's isolation was the occasional exhortation of the prison chaplain, or the order of the prison officer on some necessary detail of discipline. Pentonville came to be regarded as the last word in modern prison design. The model was promptly and extensively copied, and within six years fifty-four "lesser Pentonvilles" sprang up in different parts of the United Kingdom. In other parts of Europe, in the Dominions, in the Colonies and in India too it became the mother of many similar prisons.

To bring up the history to modern times it may be mentioned that the defects of the system of solitary imprisonment gradually came to be appreciated. A century of experience has led to its abandonment. The maximum period of solitary confinement was gradually reduced from eighteen months to nine, then to six months, to three months, to three weeks, and so on, till it came to be used only as a temporary measure for a week or two only as a punishment for prison offences. At the present day it stands condemned and has generally given place to work in association during the day and confinement in cell for the night, in cases where isolation at night is considered necessary for particular prisoners. As a result of the extensive measures of penal reform visualised in the Criminal Justice Bill of 1938 it has been decided that Pentonville Prison should be demolished and replaced by structures more in harmony with the present day ideas of prison treatment.

In France a revolution was brought about by the Penal Code of 1791 which, implicitly though not explicitly, advocated separation "Every convict sentenced to *la gene* shall be incarcerated alone in a light cell, and shall not be put in irons, nor be branded; but he shall be interdicted from all communication, during his term of sentence, with other convicts, or with persons from outside". Later, following the example of the American system there came to be adopted in France an extensive system of solitary imprisonment. In fact, the influence of the American Penitentiary System was far-reaching on the Continent, and was responsible for the adoption of solitary imprisonment in Belgium, Holland and various other countries of Europe.

#### THE SOLITARY SYSTEM IN THE UNITED STATES.

We must now turn to the United States for the most notable experiment of the separate system under the influence of the Quakers. The Society of Friends intensely believed in the efficacy of repentance and equally intensely abhorred capital punishment. So long as capital punishment was in vogue, over two hundred offences were met by

hanging. This was in close conformity with the law of England as it then stood, which the Pilgrim Fathers followed in their new home. In the year 1794 the State of Pennsylvania made a memorable departure by abolishing capital punishment except for premeditated murder. Most of the malefactors who formerly used to be got rid of by capital sentence were thus thrown upon the prison. This necessarily affected the whole machinery of punishment and brought to the fore a whole host of questions such as prison accommodation, prison discipline, and reformation as the proper objective of punishment. With the sudden increase in the prison population the question became paramount as to how the indiscriminate mixing of all kinds of prisoners resulting in endless contamination could be stopped. Under these circumstances the device of solitary confinement presented itself as a most timely remedy. Accordingly, two penitentiaries with solitary cells, one at Pittsburgh, and, later, another at Philadelphia in the yard of the Walnut Street Jail were constructed. It has been observed above that the solitary system pursued in America exercised a profound influence on European countries. The penitentiary at Philadelphia came to be copied in many parts of the world and, with local variations, its structure, has served as a model for solitary confinement for many years. It is strange that the good Quakers in their anxiety to secure reformation through repentance omitted to consider the baneful effect of solitude upon the prisoners—helpless human beings completely out of touch with their relations and friends, indeed, cut off from society altogether, and continually having to remain idle within the four walls of the solitary cells with nothing to fill the void in their minds except the remembrance of their own dark deeds. It presented a woeful spectacle to all impartial humane observers. A few of these outside testimonies began to set the minds of the Quakers a-thinking as to whether they were really on the right track. One of these came from Captain Hall:

I heard at Philadelphia one curious argument in favour of the solitary system. It was said to be so dreadfully severe that it would frighten all the rogues, liable to its action, out of the State of Pennsylvania altogether. But if this, which was gravely stated to me, were justifiable, fire, or any other species of torture, would be preferable; because while equally effectual it would be more transient in its operation, and if it stopped short of death, less horrible to think of, from being applied to the body, not to the mind. I treat this in sincere earnest, being of opinion both in North and South America, and elsewhere, that there is really no torture more severe, even to a virtuous mind, than absolute solitude; and that, to one, which has nothing but vice in its retrospect, the misery becomes absolutely unbearable.<sup>1</sup>

<sup>1</sup> *Society and Prison* by Thomas Mott Osborne, Yale University Press, pages 99-100.

Being told that the youngsters were kept quite separate elsewhere, free from the mischief of evil communication, he expressly desired to inspect that part of the establishment. This is how he describes his experience:

So he and I \* \* \* \* walked off together through a long series of half-darkened passages joined by flights of steps, some leading up, some down, till at length, far away from the rest of the world, we came to a range of cells, each 10 ft. by 6, the passage with which they were connected being feebly lighted by a narrow window at the end. These dens were closed by iron doors with chinks left for air, and in each of them was confined a single boy, who was left there both day and night, in absolute solitude.—without employment of any kind, without books, and far beyond the reach of appeal to any human being.

I went close to one of the cells, in which, as soon as my eyes became accustomed to the degree of light, I could distinguish, between the plates of iron which formed the door, a fine looking lad about thirteen years of age. On asking the keeper what crime the boy had committed to merit such severe punishment, I was told that he had twice run away from his master, to whom he was apprenticed. This was literally the sole offence for which he had thus been caged up during no less a period than nine weeks.

It would have been unnecessary to give these long extracts were it not for the purpose of showing to what extent the craze for avoiding contamination by an unnatural means, such as cellular confinement, can blind the vision of well-meaning prison reformers. It was left to Charles Dickens, the great novelist, who visited Philadelphia in 1842 to expose before the world the horrors of solitary confinement. In his "American Notes" he gives the following graphic description of what he saw and felt:—

The system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers, and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creatures. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore

I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether, if I had the power of saying 'Yes' or 'No', I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree. \* \* \* \* On the haggard face of every man among these prisoners the same expression sat. I know not what to liken it to. It had something of that strained attention which we see upon the faces of the blind and deaf, mingled with a kind of horror as though they had all been secretly terrified. In every little chamber that I entered, and at every grate through which I looked, I seemed to see the same appalling countenance. It lives in my memory, with the fascination of a remarkable picture. Parade before my eyes, a hundred men, with one among them newly released from this solitary suffering, and I would point him out. \* \* \*

My firm conviction is, that independent of the mental anguish it occasions—an anguish so acute and so tremendous that all imagination of it must fall far short of the reality—it wears the mind into a morbid state, which renders it unfit for the rough contact and busy action of the world. It is my fixed opinion that those who have undergone this punishment, must pass into society again morally unhealthy and diseased. There are many instances on record, of men who have chosen, or have been condemned, to lives of perfect solitude, but I scarcely remember one, even among sages of strong and vigorous intellect, where its effect has not become apparent, in some disordered train of thought, or some gloomy hallucination. What monstrous phantoms, bred of despondency and doubt, and born and reared in solitude, have stalked upon the earth, making creation ugly, and darkening the face of heaven!<sup>1</sup>

In the year 1816 was constructed the Auburn State Prison in New York on a different plan, so that it might lend itself to separation by night only, and enable the inmates during the day, to work together under the eyes of the Superintendent. A strong rivalry sprang up between the Philadelphia and the Auburn Penitentiaries. We have said enough of the former. The characteristics of the latter need only be briefly told. As observed above, the Auburn system introduced congregate work in shops, field, or quarry during the day, and solitary confinement in the cell during the night, but it insisted on observance of silence at all times. The imposition of perfect silence was intended to effect separation even while in company. It will be seen that there is little difference in essentials between the Philadelphia and Auburn systems. So long as the aim is to tame the criminal by putting fear into him, it makes little difference what particular method is employed

<sup>1</sup> Thomas Mott Osborne, *Society and Prisons* pp. 100-102.

—it is at best a modified form of the idea of retribution, and it leads to the same result as in other systems based on that principle. Both in Philadelphia and in Auburn, the mischief arose from their wrong objective. The pious Quakers with the best of intentions started out with the object of taming the animal in the prison with the result that it failed. At the present day, neither the Philadelphia system nor the Auburn system exists anywhere in its entirety. It is a combination of both that characterises most prisons, with the rule of silence greatly mitigated, with the introduction of occupational training in appropriate industries and with a demand being increasingly felt for other ameliorative measures to be discussed later on.

## LECTURE III

### HISTORY AND THEORY OF PUNISHMENT.

#### DEPORTATION.

Dealing with the subject of punishments and of the transformations they underwent in various epochs, one cannot omit from mention the system of deportation which became widely prevalent in the latter half of the eighteenth and the first half of the nineteenth centuries. Deportation of a sort may be traced back to an earlier period, though the system was not then resorted to as extensively. The Magna Carta provided for freedom from compulsory exile. Ways and means were, however, devised to evade the provision, so that the solemn assurance given by the Magna Carta became in course of time a dead letter. True, it was said, every Englishman had an inalienable right to remain in his own country and not to suffer exile. But what if he voluntarily abjured the country? That was a privilege not to be denied in the name of humanity! A criminal fit to be sentenced to hanging for his offence might deem it a privilege to abjure the country and depart in peace if he were granted a pardon, on pain of being hanged should he ever return. This right to 'voluntary exile' was conferred by statute in several cases as far back as the days of Queen Elizabeth. A statute authorised the administration of the oath of abjuration to Roman Catholics and to Protestant dissenters; another extended the same privilege to rogues and vagabonds. Act XVIII, C. 3, in the reign of Charles II, extended to felons under sentence of death the option between hanging and transportation, and authorised their transportation "to any of His Majesty's dominions in North America". Act IV of 1718, C. 2, passed in the reign of George I, extended the privilege to felons sentenced to a term of imprisonment not less than three years. In the last case it operated as a temporary exile: a return to the home country within the period of sentence was punishable by death. To save the State the expense of the voyage, a contract system was improvised, whereby the contractor, or his assign, was given the right to the labour of the criminal during the term of his sentence. This right could be freely bought and sold, so that if the criminal or his relations could find the wherewithal, he could himself buy up the right from the contractor; in other words, could purchase his freedom with money. It is said that sometimes he obtained his release from the contractor before he had even passed the mouth of the Thames! Thus there was a regular traffic in convict labour. It was before the general adoption

of negro slavery, and this system of white slavery was eagerly availed of by the planters across the sea for work in their plantations. With the declaration of American independence, and with the revolt of the American colonies against importing criminal population into their midst, the system had to stop for a while. In the interval which followed the attention of penalists in England was directed to development of penitentiaries. The Act of 1778 passed at the instance of Blackstone, Howard and Eden (referred to in the last lecture) delineated the essential features of reform which were to characterise the proposed penitentiaries. Presently, however, new outlets were found, though far afield, for getting rid of the undesirable criminal population. With the discovery of Australia by Captain Cook, the Government proceeded to send a fleet of vessels with a load of seven hundred and fifty-seven convicts, including women, with sufficient rations and other necessities. They arrived at Botany Bay in January, 1788 after a voyage of eight months. In a few months there was shortage of provisions; fresh supplies did not come from England, the soil of the new country proved unfruitful; convict labour proved thoroughly unskilled and unwilling; the population, being predominantly criminal, could not lend itself to ordered or disciplined living; diseases, disorder and discontent became the normal condition of the society. In course of time, however, through wise and provident government the country was opened up by roads and bridges, and signs of prosperity and order became evident. This led to a fresh influx of "criminal sewage from the Old World to the New". Gangs of convicts in England kept waiting for transhipment to the New World with a view thus to escape the gallows. The "assignment system" led to endless mischief as it enabled the worst and most inveterate of criminals to purchase absolute freedom with ill-gotten money and to roam about the land committing depredations on society, in keeping with their past habit and tradition. To those who wanted jobs it was open to secure posts of responsibility and confidence with the free use of money, quite irrespective of qualifications. These abuses sprang up not only in Sydney, but also in Norfolk Island and Van Diemen's Land, indeed, in all the settlements founded on convict labour. The colonists now began to protest against the practice of sending fresh consignments of criminals in disregard of their welfare. In 1837 a Select Parliamentary Committee was appointed to investigate the matter. As a result of their labours, a new system was adopted, known as Probation under which the criminal could by good conduct gradually improve his position and obtain conditional liberation on ticket-of-leave and, finally, complete pardon. Eventually, transportation to New South Wales was suspended in 1840. Between 1847 and 1848 all transportation was suspended. Later, under the Act of 1857, the word transportation

appeared from the Statute book. Even after that the practice continued for some time under the excuse of Probation but only for about ten years. Thus ended an iniquitous experiment which lasted for eighty years.

Other countries of Europe such as France and Germany have not lagged behind. They tried the experiment but with equally disastrous results. As for Italy and Portugal, their experience in the same line was anything but encouraging. Nearer home, the penal settlement in the Andaman Islands was established after the Sepoy Mutiny. Its history reveals a woeful tale of physical and moral degradation. The Indian Jails Committee of 1919-20 recommended its discontinuance on grounds set forth in their Report or, in the alternative, its continuance on a limited scale.

## THEORIES OF PUNISHMENT

### THE CLASSICAL SCHOOL

Hitherto we have been considering the various manifestations of punishment viewed in relation to crime. Punishment, we have seen, is regarded as something that must be set over against the crime to restore the balance, which has been disturbed. From Aristotle onwards this idea has played not an inconsiderable part in determining punishment. At bottom, it discloses the idea of retribution, conscious or sub-conscious. To equalise or balance the crime, the retribution must go forth in equal measure. With this is combined the other idea 'all men are equal in the eyes of justice'. Hence, to be just, every crime, no matter by whom committed, must be met by the punishment prescribed for it, neither more nor less. These two taken together may fairly be regarded as the essential principles of crime and punishment according to the classical school—equality between crime and punishment, and equality between man and man. The classical school came just when it was most needed and did just what it was destined to do, namely, to put a stop to arbitrary punishment varying with the whims or caprices of the man in power. But more than this cannot be credited to it. The retributory basis of punishment remained as before.

The cry of *liberté, fraternité, égalité* rang through the length and breadth of Europe in the latter half of the eighteenth century. They drank the doctrine of equality to intoxication. Penology did not escape the impact of this thought. Years before the actual French Revolution the revolution in thought had already come and 'equality' was in the air. In the realm of penology it was an Italian who sounded the note. The name of Cesare Beccaria (1735-1794) is often associated with the classical school as its founder, and with ample justification. In his famous work published in 1764 he turned his condemnation against the



unrestricted power of the judges to vary the punishment at pleasure and laid down the principle that no punishment should be greater than that warranted by the crime and that all men should be held equal in the eyes of law. It was no doubt an echo of the old demand. Beccaria threw the whole weight of his personality in support of the principle, and presented it to the world with a power and persuasiveness all his own. Its practical effect on penological thought of the eighteenth century was tremendous. It has been said that "of the eighty more or less radical propositions which it (his work, 'Crimes and Punishments') contains, more than seventy have been adopted in our common laws beginning with the abolition of torture and of capital punishment".<sup>1</sup> It is, however, noteworthy that the viewpoint of Beccaria, quite in keeping with the classical school, kept him restricted to a consideration of the crime itself and its reaction in the shape of punishment. The personality of the criminal did not appear in the horizon. It was left for another distinguished Italian, Cesare Lombroso, the father of criminal anthropology, to do so.

#### THE NEO-CLASSICAL SCHOOL.

Meanwhile arose the Neo-Classical school. I spoke, in the last lecture, of the important modifications of the French Penal Code of 1791 effected by the revised code of 1810. The judge was given discretionary power to vary the punishment between the maximum and the minimum fixed by law. This does not mean that he had the power to go behind the objective act, the offence, and take into consideration the subjective limitations of the offender. The classical theory would not admit of it. It rested on the pre-supposition of absolute responsibility of the individual for the committed act. The judge could only take note of certain external material circumstances connected with the act. It was not for him to make the punishment lighter, or heavier, according as what we know to-day as 'extenuating circumstances' was present or absent. That would take the judge beyond the objective standard fixed by the classical school of law. He was bound to administer the particular kind of punishment prescribed by the law for a particular offence; it was not for him to change from one kind to another as, for instance, from solitary confinement to penal servitude, or *vice versa*. Moreover, insanity, minority, idiocy, physical or mental disorder, mischance or misadventure or any circumstance affecting the question of responsibility would not come within his purview: in the eyes of classical law the presumption of free will and consequent responsibility on the part of the criminal was absolute and irrebuttable. It is evident that the revised Code of 1810, though it marked an

<sup>1</sup>See *Modern Theories of Criminality* by C. Bernaldo de Quirós, p. 125—Little, Brown and Co., 1912.

advance, did not involve a departure in essentials from the strict classical standpoint. This position could not last long. With the advance of the sciences of biology, physiology, pathology and psychiatry, not to speak of other sciences, a great deal that was obscure in human conduct and that used formerly to be explained by the *deus ex machina* of metaphysics came to be accounted for by natural causes. The firm faith in absolute free will was rudely shaken and gave place to the conviction that there were degrees of responsibility shading off into irresponsibility. What the Neo-Classical School did was to respond to this growing public consciousness and, while adhering to the orthodox classical position, to make room for extenuating circumstances, for complete or partial exemption from liability in appropriate cases such as minority, insanity, imbecility, etc. Even this advance was but very little.

#### UNIVERSALISING OF RESENTMENT.

The classical objective was still predominant. It would be wrong to think that the concept of punishment had undergone a material change, inasmuch as it was no longer regarded as a reaction by the aggrieved party on the wrong-doer, but by society for the injury done to it. Whereas criminal law in the olden days was "a formulated system of self-protection," now it has become "an instrument of *social* defence adapted to the requirements of the sense of justice." This may be true. There is no doubt an advance on the crude primitive view of retribution discussed in the last lecture. Retribution inflicted on the wrong-doer was there regarded as the normal mode of reparation to the person injured, the retribution as well as the reparation being estimated in relation to the individual wronged. The advance consists in this that the retribution as well as the reparation is now estimated to be in relation to society as the body wronged, and thus universalized. But the punitive idea remains intact in the so-called self-protection of society, or 'social defence' as it is alternatively called. As Sidgwick says:

"History shows us a time in which it was thought not only as natural, but as clearly right and incumbent on a man to requite injuries as to repay benefits: but as moral reflection developed in Europe this notion was repudiated, so that Plato taught that it could never be right really to harm any one, however he may have harmed us. And this is the accepted doctrine in Christian societies as regards requital by individuals of personal wrongs. *But in this universalized form the old conviction still lingers in the popular view of criminal justice:* it seems still to be widely held that justice requires pain to be inflicted on a man who has done wrong, even if no benefit result either to him or to others from the pain. Personally, I am so far from holding this view that I have an instinctive and strong moral aversion to it: and I hesitate to

attribute it to common sense since I think that it is gradually passing away from the moral consciousness of educated persons in the most advanced communities; but I think it is still perhaps the more ordinary view. This, then, is one element for what Aristotle calls corrective justice, which is embodied in criminal law".<sup>1</sup>

Thus the modern emendation of the classical theory of punishment is that it universalizes resentment. The objective is no longer to satisfy individual resentment but social resentment which appears in the shape of Aristotle's 'corrective justice' and claims to set right the wrong done, this time to society, by means of punitive measures. The fundamental basis of this advanced view is that every offence involves an injury to the social framework which calls for adequate reparation. Punishment is the only means of effecting reparation. Such punishment must be quick, certain and uniform in all like cases. For every specific injury there is to be a specific punishment calculated to nullify or counterbalance the evil suffered by society. In what respect, then, is this so-called advanced view essentially different from the older view of individual resentment? Then, as now, the same objectivity or materiality of the crime is the dominant factor.

The inadequacy of the classical objectivity of crime and punishment is clearly understood through the German expressions *Vergeltungsstrafe* and *Zweckstrafe*. The former stops short at objective reparation, the latter reaches out to the final purpose of punishment,—whether it be the health or rehabilitation of the individual offender or the health of the society (l'hygiene preventive). The point of incidence changes from the crime to the criminal, from the objective to the subjective, and the purpose changes from retribution or the Aristotelian 'corrective justice' to real correction of the individual, and, later, of society.

## EMERGENCE OF CRIMINOLOGY.

### THE ITALIAN POSITIVIST SCHOOL.

Historically, the teachings of Lombroso furnish the turning point of European thought from the crime to the criminal. As Enrico Ferri says:

Lombroso's greatest merit was to draw the attention of the world to the personality of the criminal; before, men knew penal justice, but penal justice did not know men, as has been stated by Van Hamel who, together with Liszt and Prins, founded the new school of penal law. From its beginning the school of Lombroso has made a distinction between different classes of criminals and has always recognized the influence of the social environment on

<sup>1</sup> Sidgwick's *Methods of Ethics*, fifth edition p. 281—Macmillan & Co., 1893. The italics are mine.

the genesis of criminality. Also, the Italian school does not consider merely the physical qualities of the offender, but his psychological, intellectual, sentimental and moral personality too.<sup>1</sup>

This testimony coming as it does from Enrico Ferri, one of the greatest of Lombroso's disciples, ought to remove all doubt that still hangs around the principles of Lombroso's penal philosophy. Lombroso's first work entitled 'The Criminal in Relation to Anthropology, Jurisprudence and Psychiatry' was published in 1876. Originally a small pamphlet, it gradually grew into a work of three volumes. In due course, it was followed by 'The Female Offender,' 'Political Crimes and Revolutions,' 'The Anarchist' and other works. His last work, 'Crime: Its Causes and Remedies' may be regarded as a comprehensive and synthetic presentation of his maturer views. With the appearance of the first edition of his first work in 1876, European thought on the subject of crimes and criminals was at once thrown into a violent ferment. In it he propounded the theory that crime is caused almost entirely by the anthropological characteristics of the criminal. Like every pioneer, absorbed in the immediate object of his research, he placed exceeding emphasis on anthropology in relation to the criminal, and appeared for the moment almost to ignore other factors. But in point of fact he omitted none. In later editions of 'The Criminal' he assigned to social and other factors their legitimate value in producing the criminal characteristics. In 'Crime: Its Causes and Remedies' Lombroso gave due weight to all the various factors that go to make up the constitution of the criminal. Meteorology and climate, geology (mountainous and other formations of soil) race, heredity, civilization, density of population (immigration and emigration, birth rate, etc.), means of subsistence (economic condition, famine, food-price) alcoholism, prostitution, unemployment, education, religion, bad government—in short, almost every conceivable cause, hereditary and environmental, that affects and determines human conduct, directly or indirectly, has been given its proper place in his etiology of crime. It is, therefore, not correct to say, as is popularly believed, that the founder of criminal anthropology was a veritable fanatic who had no use for anything else but anthropology in arriving at conclusions in penology. The study of the numerous causes that are at work in influencing human action and in generating crime brought about a new orientation which led to the emergence of criminology as a new branch of knowledge, henceforth to be conducted on strictly scientific lines with the aid of various sister sciences. The criminal came to be studied as an individual patient, exhibiting pathological conditions which might either lend themselves to successful treatment or might be

<sup>1</sup> *Proceedings of the Ninth International Penitentiary Congress*, London p. 236 (Staempfli & Co., Bern, 1927).

too deep-seated for any attempt at cure or rehabilitation. The old system of cataloguing crimes and assigning specific punishments to specific crimes threatened to fall into disrepute and, as in medicine so in penology, the criminal like the patient came to occupy the foremost place. How it reacted on the state machinery of punishment will appear in its proper place as we proceed. For the moment, I shall content myself with giving only one illustration, taken at random, of how this system has unconsciously leavened thought and changed the objective of jurists and legislators. Clarence Darrow one of the foremost lawyers and jurists in the United States, speaking of every man as a machine, well or ill conditioned to function in society, says:

To get this knowledge of the past of each machine is the duty and work of the tribunal that passes on the fate of a man. It can be done only imperfectly at best. \* \* \* \* The tribunal whose duty it is to fix the future place and status of its fellow men should be wise, learned, scientific, patient, humane. It should take the time and make its own investigation, and it can be well done in no other way. When public opinion accepts the belief that punishment is only cruelty, that conduct is a result of causes, and that there is no such thing as moral guilt, investigation and sorting and placing of the unfortunate can be done fairly well. The mistakes will be very few and easily corrected when discovered. There will be no cruelty and suffering. The community will be protected and the individual saved.

Neither will this task be so great as it might seem at first glance. Trials would probably be much shorter than the endless, senseless bickering in courts, the long time wasted in selecting juries and the many irrelevant issues on which guilt or innocence are often determined, make necessary now. Most of the criminal cases would likewise be prevented if the state would undertake to improve the general social and economic condition of those who get the least. Only a fraction of the money spent on human destruction, in war and out, would give an education adapted to the individual, even to the most defective. It would make life easy by making the environment easy. Only a few of the defective, physically and mentally, would be left for courts to place in an environment where both they and society could live. Perhaps some time this work will be seriously taken up. Until then, we shall muddle along, fixing and changing, and punishing and destroying; we will follow the old course of the ages, which has no purpose, method or end, and leaves only infinite suffering in its path.<sup>1</sup>

The above measures visualise the positive approach to the problem of crime of which Lombroso was the pioneer.

#### CRIMINAL ANTHROPOLOGY—CESARI LOMBROSO.

But perhaps we are anticipating. We must look more closely into the exact nature of Lombroso's investigations. Born in 1836, of a

<sup>1</sup> *Crime, Its Cause and Treatment* by Clarence Darrow, pp. 128-29. George G. Harrap & Co., Ltd., 1922

Jewish family, Lombroso received his education for medicine, and in 1866 specialised in psychiatry. For a time he was employed as an army doctor which gave him opportunities for the study of Italian soldiers. It is said that at this time he was much impressed by the extent of tattooing which prevailed among them, an experience that led him afterwards to attach great significance to it. Later, he became attached to a lunatic asylum where he made many clinical observations, and examined many cadavers from among the inmates who died, with a view to study characteristic anatomical defects, if any, that might throw light on the problem of crime. In these investigations he must have been influenced, consciously or unconsciously, by some distinguished predecessors of his, the results of whose researches had already become public property. The work of Laplace and Darwin formed in fact the basis of his researches. Apart from the theory of evolution which was in the air, there was from the most ancient times enough thought on the correspondence between anatomical, cranial and other bodily formations, and mental characteristics. Indeed, Lombroso himself refers to it with the humility which is native to the mind of the savant. He observes:

The novelty of my most discussed conclusions goes back to prehistoric times. Homer speaks of Thersites, Solomon writes that the heart alters the face of the evil man and, above all, Aristotle, Avicenna and J. B. Dalla Porta discussed extensively criminal physiognomy, the last two going perhaps further than we ourselves. What else shall be added when Polemon, after having insisted upon the narrow forehead of criminals speaks even of their *mancinisimo* (left-handedness), an observation which I thought to have been the first to make.

But there were other thinkers more modern who had worked in the same field. Psychiatry was a new science of the eighteenth and nineteenth centuries. Pinel's book 'Medical and Philosophical Treatise on Mental Alienation' was published in 1801. It inaugurated a scientific study of insane psychopathy and put a stop to the penal treatment of the insane on the same footing as that of the sane. Pinel (1745-1826) was followed by Esquirol and a whole generation of alienists too numerous to mention. Their work, as Bernaldo de Quiros points out, "extended the boundaries of mental infirmity and reduced the field of delinquency and prepared the explanation of the morbid nature of crime."<sup>1</sup> We next come across Morel, another outstanding figure, who in 1857 propounded his theory of degeneration in France through his work entitled 'Physical, Intellectual and Moral Degeneration of the Human Species.' Degeneration according to him was a kind of retrogressive natural selection: "the degeneration of our nature is due to the going astray of the primitive type which contains in itself all the

<sup>1</sup> *Modern Theories of Criminality*, p. 6.

necessary elements for the preservation of species." Nor must we omit Despine who drew attention more particularly to the psychological side of the criminal's mind. In his book entitled: 'Natural Psychology, an Essay on the Intellectual and Moral Faculties in their Normal State and Abnormal Manifestations in the Insane and the Criminals,' published in Paris in 1868, he stressed the absence of remorse in the habitual criminal as a fundamental fact pointing to his moral anomaly. In England similar investigations were proceeding as is evidenced by Clapham and Clarke's 'The Criminal Outline of the Insane and Criminal' (1846), Winslow's 'Lettsonian Lectures on Insanity' (1854), Thompson's 'Psychology of Criminals' (1870). And then we come to Maudsley's notable contribution to the thought of his times. He diagnosed crime as moral insanity, indicating that there was a middle zone between moral insanity and delinquency in which were ranged various grades of moral and criminal infirmity from the more insane and less perverse to the less insane and more perverse. The above brief account suffices to show that the theory of crime as a species of abnormality,—anthropological, moral, physical or psychical,—was already being mooted in one form or another before the advent of Lombroso. As regards the influence of the social factor on crime, perhaps the English and the French thinkers were the first sponsors of that doctrine, though it does not appear that their writings and researches were aimed directly at the problem of crime. The credit of sounding the first note as a social criminologist must go to Quetelet (1796-1874) whose dictum 'Society prepares crime; the criminal becomes its executive' pithily puts his position as set forth in his 'Social Physics' published in 1869. He also propounded the thermic law of crime by which he maintained that the larger number of crimes of blood in the southern countries of Europe, and of crimes against property in the northern, were attributable to thermic conditions.

Lombroso's name is prominently associated with the doctrine that the criminal is an atavistic phenomenon, in other words that he represents a throw-back or reversion to an earlier type of the past. This was greatly whittled down by him in his later writings in which it ceased to play such a conspicuous part as in his earlier ones. Let him speak in his own words as to how and why he came to propound it:

In 1870, I was carrying on for several months researches in the prisons and the asylums upon cadavers and living persons, in order to determine upon substantial differences between the insane and criminals, without succeeding very well. At last I found in the skull of a brigand a very long series of atavistic anomalies, above all an enormous middle occipital fossa and a hypertrophy of the vermis, analogous to those that are found in inferior vertebrates. At the sight of these strange anomalies the problem of the nature and of the origin of the criminal seemed to me resolved:

the characteristics of primitive men and of inferior animals must be reproduced in our times. Many facts seemed to confirm this hypothesis; above all, the psychology of the criminal; the frequency of tattooing and of professional slang; the passions as much more fleeting as they are violent, above all that of vengeance; the lack of foresight which resembles courage and courage which alternates with cowardice, and idleness which alternates with the passion for play and activity.<sup>1</sup>

Crime according to Lombroso proceeds from abnormal anatomical physiological and psychological characteristics or stigmata. In the lower orders of animals also is to be found corresponding conduct which appears as the veritable equivalent of crime. What is cannibalism, infanticide, patricide, murder, theft, mutilation but acts contrary to the welfare and the general habits of the human species? Equivalents of these exist among the animals. We find equivalents among savages, and even among abnormal children. It is the consideration of these outstanding facts found in lower animals, savages and abnormal children that led Lombroso to propound his first theory that crime is of atavistic origin. His anatomical researches seemed to confirm his view. He made a study of 383 skulls of criminals, and the anthropometry and physiognomy of 5907 criminals, examined by himself and several other criminologists. He came to the conclusion that "the study of the living, in short, confirms, although less exactly and less constantly, this frequency of microcephalics, of asymmetries, of oblique orbits, of prognathisms, of frontal sinuses developed as the anatomical table has shown us. It shows new analogies between the insanes, savages, and criminals. Upon this and a large mass of other material he proceeded to classify criminals into (1) born criminals, (2) criminals by passion, (3) insane criminals, (4) occasional criminals. The born criminal represents a distinct anthropological type. In him is often found the psychological characteristic of tattooing indicating marked analgesia reminiscent of the primitive man.

One of the most characteristic traits of primitive man, or of the savage, is the facility with which he submits himself to this operation, surgical rather than aesthetic. \* \* \* \*. The special taste of the criminal for a painful operation so long and so full of danger as tattooing, the large number of wounds their bodies present, have led me to suspect in them a physical insensibility greater than amongst most men, an insensibility like that which is encountered in some insane persons, and especially in violent lunatics. \* \* \*. From all of these facts it could be deduced that nearly all the different kinds of sensibility, tactile, olfactory, and of the taste, are obtuse in the criminal. \* \* \* \*. Their physical

<sup>1</sup> Speech at the Sixth Congress of Criminal Anthropology at Turin in April, 1906. He died in 1909.



insensibility recalls quite forcibly that of savage peoples who can face, in the initiations to puberty, tortures which a man of the white race could never endure.

Along with physical insensibility there is in the criminal man moral insensibility. Pity for the suffering of another is entirely absent and this is largely due to the fact that he himself is insensible to suffering. Atavism contributes to the growth and prevalence of professional slang among the born criminals. The hieroglyphics and the literature of criminals is all their own. According to Lombroso the criminal type has not only special, physical and anatomical characteristics, but also the characteristics of moral insanity. The affinity between the born criminal, and the moral imbecile is specially proved, he believes, by a study of the epileptic.

There exists in epilepsy a uniting bond much more important, much more comprehensible, which can be studied upon a great scale, that unites and bases the moral imbecile and the born criminal in the same natural family \* \* \* \* Criminality is, therefore, an atavistic phenomenon which is provoked by morbid causes of which the fundamental manifestation is epilepsy \* \* \* \* \* The perversion of the affective sphere, the hate, exaggerated and without motive, the absence or insufficiency of all restraint, the multiple hereditary tendencies, are the source of irresistible impulses in the moral imbecile, as well as in the born criminal, and the epileptic.

The born criminal is a class by himself, and the treatment that is to be accorded to him by society must be by special methods, such as elimination, different from those applicable to the other criminals. The criminals by passion exhibit characteristics which are sometimes traceable to epilepsy and impulsive insanity. These are none of the generous passions that burst forth unexpectedly but of the worst and most ignoble and ferocious kind, indicating a pathological condition of the mind. A special class of criminals by passion is the political criminal. The features that mark him are, however, different and are thus described:

In nearly all political criminals by passion we have noticed an exaggerated sensibility, a veritable hyperaesthesia, as in the ordinary criminals by passion; but a powerful intellect, a great altruism pushed them towards ends much higher than those of the latter: It is never wealth, vanity, the smile of woman (even though often eroticism is not lacking in them, as in Garibaldi, Mazzini, Cavour) which impel them, but rather the great patriotic, religious, scientific ideals.

The third class, the insane criminal, is by no means on the same footing as the born criminal. But Lombroso discovers certain analogies between the two, and he accounts for certain kinds of crimes by means of insanity. The fourth class, the occasional criminal, has three

sub-divisions: (a) pseudo-criminals, (b) criminaloids, and (c) habitual criminals. Pseudo-criminals are those who commit crimes, not out of their nature, but owing to extraordinary circumstances, often without meaning to do wrong, such as for self-defence, for sustenance of the family, etc. The acts that they commit do not involve danger to the body social. Nor do they offend the social conscience. Their crimes are "rather juridical than real, because they are created by imperfections of the law rather than by those of men." The criminaloid has "only a touch of degeneracy." The tendency to do wrong is organic in them, but it is less intense so that a determining occasion must arise to put it in operation, whereas, in the born criminal, the organic tendency is strong enough to be itself the determining factor. The habitual criminal is distinguished from the born criminal as well as from the criminaloid in that he does not suffer from abnormal heredity. He is normal from birth and is without any tendencies, or a peculiar constitution, for crime, so that it is not only one determining circumstance which makes him a criminal, but a series or number of circumstances such as want of early education, of parents, schools, etc., etc., that cause him to turn a criminal.

The two points that have brought the severest of criticisms on his system are his theory of the 'criminal type' and of 'atavism.' Later, he practically abandoned the theory of atavism and favoured the theory of degeneration instead. As regards the 'criminal type' he thus explains it:

In my opinion, one should receive the type with the same reserve that one uses in estimating the value of averages in statistics. When one says that the average life is thirty-two years and that the most fatal month is December, no one understands by that that every body must die at thirty-two years and in the month of December.

Thus understood the criminal type ceases to be the bogey it has been to criminology. It stands merely for the average struck from a consideration of a certain class of criminals. It is an *ensemble* of certain characters found in them.

Other aspects of Lombroso's work did not escape criticism. His conclusions derived from anatomical and anthropometric observations raised wide-spread controversy. They were subjected to thorough scientific examination. In England, in particular, it provoked considerable critical interest. Dr. Griffiths and, later, Dr. Charles Goring made an extensive observation of prison convicts, mostly recidivists, and also non-criminals such as under-graduates of Oxford and Cambridge. Prof. Karl Pearson lent his help for applying the accredited methods of statistical investigation to these data. Into the details of these investigations it is needless to enter. The upshot was that the

results did not at all warrant Lombroso's sweeping conclusions. The criminal type, it was said, was no better than the equator which does not in reality exist. Dr. Goring described Lombroso's theory as a superstition, "kith and kin with the misnamed 'sciences' of phrenology chiromancy and physiognomy." Nevertheless, it must be admitted that Lombroso was the first to introduce the application of the methods of inductive science to the science of crime. This is demonstrated by the fact that, to combat his conclusions, England had to adopt that method for the first time in dealing with facts relating to crime. Sir Evelyn Ruggles-Brise, in his preface to Goring's work, calls it "the first attempt that has been made in this, or in any other country, to arrive at results in criminology by the statistical treatment of facts." Moreover, the attitude of penalists all over the world was completely transformed. They realised that the centre point in penology was neither the crime nor punishment: it was the criminal himself, who was henceforth to be studied in relation to his heredity, his psychology and his environments, physical and social.

#### CRIMINAL SOCIOLOGY—ENRICO FERRI

After Lombroso the Italian School found a powerful exponent in Enrico Ferri. If Lombroso was the founder of criminal anthropology, Ferri was the founder of criminal sociology. His presentation of Lombroso's school was correct and comprehensive. In the true spirit of discipleship he explained what was still obscure, but he enriched the thought of the Italian School by his own statistical researches, and in his brilliant work entitled 'Criminal Sociology' he vividly visualised the practical applications of the doctrines he upheld. Born in 1856, he graduated in 1874 and under Pietro Ellero, Professor of Criminal Law in the University of Bologna, did his apprenticeship in the statistics of crime. In 1876, he published his first work entitled 'The Theory of Imputability and the Denial of Free Will.' He then went to the University of Paris. His 'Studies of Criminality in France from 1876 to 1878' may be attributed to his researches during this period. He next went to the University of Turin, where he became a pupil of Lombroso. Later he worked as Professor of criminal law in the universities of Bologna, Siena, Pisa and, finally, Rome. He also carried on private practice in the profession of law at Rome for some time.

Ferri's 'New Horizons of Criminal Law and Penal Procedure' was published at Bologna in 1884. Its fourth edition appeared under the title of 'Criminal Sociology' at Turin in 1900. Among his many works such as 'The Homicide in Criminal Anthropology', 'The Criminals in Art', 'Socialism and Criminality' all of which are full of interesting matter and original thought, the work on 'Criminal Sociology' stands out pre-eminent as a synthetic presentation of the Italian School.

First of all, he clears up all misconception as to the really comprehensive position of the (Italian) Positive School. The 'Theory of the Factors' by which he means the three factors, anthropological, physical and social, which are jointly responsible for crime, has from the beginning, he says, been the basis of the school.

We cannot find an adequate reason either for a single crime or for the aggregate criminality of a nation if we do not take into account each and all of the different natural factors which we may isolate in the exigencies of our studies, but which always act together in an indissoluble union.

No crime, whoever commits it, and in whatever circumstances, can be explained except as the outcome of individual free-will, or as the natural effect of natural causes. Since the former of these explanations has no scientific value it is impossible to give a scientific explanation of a crime (or indeed of any other action of man or brute) unless it is considered as the product of a particular organic and psychical constitution, acting in a particular physical and social environment.

Therefore, it is far from being exact to assert that the Positive Criminal School reduces crime to a purely and exclusively anthropological phenomenon. As a matter of fact, this school has always from the beginning maintained that crime is the effect of anthropological, physical and social conditions which evolve it by their simultaneous and inseparable operation.<sup>1</sup>

He proceeds to give details of these factors which at once present penology and criminology as among the most comprehensive branches of human knowledge, a thought that never could have occurred to even the foremost exponents of the classical school:<sup>2</sup>

I have drawn attention to the anthropological or individual factors of crime, the physical factors, and the social factors.

The anthropological factors inherent in the individual criminal are the first condition of crime ; and they may be divided into three sub-classes, according as we regard the criminal organically, physically or socially. The organic constitution of the criminal comprises all anomalies of the skull, the brain, the vital organs, the sensibility, and the reflex activity and all the bodily characteristics taken together such as the physiognomy, tattooing and so on. The mental constitution of the criminal comprises anomalies of intelligence and feeling, especially of the moral sense, and the specialities of criminal writing and slang. The personal characteris-

<sup>1</sup> *Criminal Sociology*, Chap. II pp. 74-75—D. Appleton & Co., 1915.

<sup>2</sup> In regard to law and legislation generally such a thought is not uncommon but it is rare with reference to the study of the criminal. Bentham, in his *Introduction to the Principles of Morals and Legislation*, enumerates the following circumstances as necessary to be considered in legislation:—

"Temperament, health, strength, physical imperfections, culture, intellectual faculty, strength of mind, dispositions, ideas of honour and religion, feelings of sympathy and antipathy, insanity, economic conditions, sex, age, social status, education, profession, climate, race, government, religious profession."

tics of the criminal comprise his purely biological conditions, such as race, age, sex ; bio-social conditions such as civil status, profession, domicile, social rank, instruction, education, which have hitherto been regarded as almost the exclusive concern of criminal statistics.

The physical factors of crime are climate, the nature of the soil, the relative length of day and night, the seasons, the average temperature, meteoric conditions, agricultural pursuits.

The social factors comprise the density of population ; public opinion, manners and religion ; industrial pursuits ; alcoholism, economic and political conditions ; public administration, justice and police ; and in general legislative, civil and penal institutions.<sup>1</sup>

As to the operation of these 'factors' in determining the quality and quantity of offences at any stated time or place, we have to turn to Ferri's 'Law of Criminal Saturation' He thus states it:

Criminal statistics show that crime increases in the aggregate with more or less notable oscillations from year to year, rising or falling in successive waves. Thus it is evident that the level of criminality in any one year is determined by the different conditions of the physical and social environment, combined with the hereditary tendencies and occasional impulses of the individual in obedience to a law which I have called in analogy with chemical phenomena 'The Law of Criminal Saturation':

Just as in a given volume of water, at a given temperature, we find a solution of a fixed quantity of any chemical substance, not an atom more or less, so in a given social environment, in certain defined physical conditions of the individual, we find the commission of a fixed number of crimes.<sup>2</sup>

Again,

Not only so but it may be added that as, in chemistry, over and above the normal saturation we find that an increased temperature of the liquid envelopes an exceptional super-saturation, so in criminal sociology, in addition to the ordinary saturation we are sometimes aware of an excess of criminal saturation, due to the exceptional conditions of the social environment.<sup>3</sup>

What then about punishments? It will not do only to understand the factors which operate to produce crime. What does the Positive School hold to be the proper method for counteracting crime? Here Ferri's analysis is most searching. Upon a proper analysis, he holds that punishment cannot go far to rid society of crime.

Force is always a bad remedy for force. In the Middle Ages, when punishments were brutal, crimes were equally savage ; and society in demoralising rivalry with the atrocity of criminals laboured in a vicious circle. Now, in the lower social grades, the

<sup>1</sup> *Criminal Sociology*, pp. 52-53.

<sup>2</sup> *Ibid* p. 76.

<sup>3</sup> *Ibid* p. 78.

brutal man who often resorts to violence, is in his turn frequently the victim of violence so that amongst criminals, a scar is somewhat of a professional distinction.<sup>1</sup>

A man does not change his identity ; and no penal code, whether mild or severe, can change his natural and invincible tendencies, such as inclination to pleasure and persistent hope of impunity.<sup>2</sup>

The above passages would at first sight seem to indicate that Ferri's is a counsel of despair with reference to punishments. The following, however, will give an idea of his true position :—

It is easily seen, when we compare the total result of crime with the varied character of its anthropological, physical and social factors, that punishment can exert but a slight influence upon it. Punishment, in fact, by its special effect as a legal deterrent acting as a psychological motive, will clearly be unable to neutralise the constant and hereditary action of climate, customs, increase of population, agricultural production, economic and political crises, which statistics invariably exhibit as the most potent factors of the growth or diminution of criminality.

It is a natural law that forces cannot conflict or neutralise each other unless they are of the same kind. The fall of a body cannot be retarded, changed in direction or accelerated save by a force homogenous with that of gravity. So punishment, as a psychological motive, can only oppose the psychological factors of crime and indeed only the occasional and moderately energetic factors ; for it is evident that it cannot as a preliminary to its application eliminate the organic hereditary factors which are revealed to us by criminal anthropology.

Punishment, which has professed to be such a simple and powerful remedy against all the factors of crime, is therefore a panacea whose potency is far beneath its reputation.<sup>3</sup>

It will be evident from the above quotations that the Positive School, unlike the Classical School does not rest its hope of effectually dealing with crime and criminals by means of punishments. On the principle 'like cures like' Ferri agrees with Prins that "for social evils we require social cures," and crimes are mostly the offspring of social evils. Punishments which were wrongly aimed directly by the classical legislator at the suppression of crimes having failed of their object, it now becomes the duty of the criminal sociologist to look for other means of social defence, which are to be found not in repression but in prevention. Not that the system of punishments will have to be abolished. They have their place in the scheme of social defence. But there are more indirect and, consequently, more effective methods of combating crime.

<sup>1</sup> *Ibid* p. 108.

<sup>2</sup> *Ibid* p. 107.

<sup>3</sup> *Criminal Sociology*—pp. 92-93.

This brings us to Ferri's Penal Substitutes. He puts the matter so succinctly that I would rather have you listen to his own exposition:—

If the counteraction of punishment must inevitably be opposed to criminal activity, still it is more conducive to social order to prevent or diminish this activity by means of an indirect and more effective force.

In the economic sphere, it has been observed that when a staple product fails, recourse is had to less esteemed substitutes, in order to supply the natural wants of mankind; so in the criminal sphere, as we are convinced by experience that punishments are almost devoid of deterrent effect, we must have recourse to the best available substitutes for the purpose of social defence.

These methods of indirect defence I have called *penal substitutes*. For whereas the food substitutes are as a rule only secondary products, brought into temporary use, penal substitutes should become the main instruments of the functions of social defence, for which punishments will come to be secondary means, albeit permanent. For in this connection we must not forget the law of criminal saturation, which in every social environment makes a minimum of crime inevitable, on account of the natural factors inseparable from individual and social imperfection. Punishments in one form or another will always be, for this minimum, the ultimate though not very profitable remedy against outbreaks of criminal activity.

These penal substitutes, when they have once been established in the conscience and methods of legislators, through the teaching of criminal sociology, will be the recognised form of treatment for the social factors of crime.' \* \* \* the social organism will be so adjusted that human activity, instead of being continually and unprofitably menaced with repression, will be insensibly directed into non-criminal channels, leaving free scope for energy and the satisfaction of individual needs, under conditions least exposed to violent disturbance or occasions of law-breaking.<sup>2</sup>

Again,

The legislator, on whom it devolves to preserve the health of the social organism, ought to imitate the physician, who preserves the health of the individual by the aid of experimental science, resorts as little as possible, and only in extreme cases, to the more forcible methods of surgery, has a limited confidence in the problematic efficiency of medicines, and relies rather on the trustworthy processes of hygienic science.<sup>3</sup>

In the latter part of his work Ferri deals in great detail with the penal substitutes, or equivalents of punishments, and works out an elaborate scheme whereby, on the basis that conduct is conditioned and determined by the 'factors,' and not by free-will as understood by the classical school, it may be regulated on lines most conducive to social

<sup>1</sup> *Ibid* p. 112.

<sup>2</sup> *Ibid* p. 113.

<sup>3</sup> *Ibid* p. 133.

hygiene. He recommends numerous preventive measures, social, political, educational, economic and industrial, laying his finger on many of the dark spots of present day society.

#### CRIMINAL PSYCHOLOGY—RAFFAELE GAROFALO.

The next exponent of the Positive School is Raffaele Garofalo. Born at Naples in 1852. Garofalo received a liberal university education and filled many positions of eminence as a Magistrate, a Senator, and Professor of Law and Procedure in the University of Naples. "With the anthropologist Lombroso," says Bernaldo De Quiros, "the sociologist Ferri and the jurisconsult Garofalo, the school of criminal anthropology can be considered as fully established. Hence one of the critics has called these three men 'evangelists' and their works 'gospels.' From that time on they are always mentioned in a kind of trinity, a little divided at times by Garofalo's political and penal conservatism."

Of his many works the one best known to the world, and the one on which his fame justly rests, is entitled 'Criminology' published at Turin in 1885. In it he elaborates his system which at first sight seems to savour somewhat of the classical trend of thought. Although, however, he differs in certain respects from Lombroso and Ferri, he is in agreement with them in one fundamental point in that he regards the study of criminal, and not the crime, as the primary object, and insists on the scientific approach to the study of crime, as distinguished from the traditional method of the classical school based on the doctrine of free will and responsibility. Speaking generally, the main difference between him and his colleagues of the positive school is that his treatment is more psychological than anthropological or sociological, and he lays more emphasis on the efficacy and necessity of punishments from the judicial and administrative point of view. This furnishes the reason for his severe criticism of Ferri's penal substitutes, as having no juridical foundation.

He treats the problem of crime from the evolutionary standpoint, tracing the evolution of moral sense and defines what he calls natural crime as "an offence against the fundamental altruistic sentiments of *pity* and *probity* in the average measure possessed by a given social group." He distinguishes these so-called natural crimes from others which may, therefore, be called artificial and positive. The natural crimes arise from a psychological anomaly. This, once fixed in the process of evolution, remains unaltered and inexorably leads to offending acts. He classifies criminals into murderers, violent criminals, offenders against property, sexual or lascivious criminals. All these are explicable by the two categories—lack of pity and probity. Murderers and violent criminals are natural offenders against humanity, because there is a fundamental psychological anomaly they labour under in respect of the



sentiment of pity. Thieves and sexual criminals, we take it, suffer from the same anomaly in regard to the sentiment of probity. Thus these crimes, the essence of which in his opinion is that they affect society injuriously, are brought within a compact area. The prime object of legislation must be to devise punishments for these. "Undoubtedly," says he "the legislator must punish both classes of crime alike, but true science is interested in the first, namely, the natural forms of delinquency."

Regarding punishments, he is in favour of elimination, total or partial, in respect of natural criminals. The three forms of elimination are (1) death, (2) imprisonment for life and (3) transportation. Besides these he recommends enforced reparation for those who have committed crime under the pressure of exceptional circumstances which are not likely to recur. These criminals though guilty of "true natural crime" may not be devoid of moral sense and, therefore, the special treatment is accorded to them.

As regards others who present symptoms of a "permanent psychological anomaly," they are not deserving of social life and in order that they may not commit further depredations on society should be totally or partially eliminated by death, imprisonment for life, or transportation. Of the latter two, he favours the last. His scheme of punishment, unlike that of the classical school is not based on vengeance, retribution or expiation. It is based on the principal of social defence.

It will, therefore, be evident that in spite of substantial points of difference between him and Lombroso and Ferri, Garofalo is rightly regarded as an illustrious member of the positive school. In his own estimation he belongs to the school of criminal anthropology only if "it be granted that of this science psychology is the most important chapter."

## LECTURE IV

### HISTORY AND THEORY OF PUNISHMENT (CONTINUED)

#### A BRIEF REVIEW OF MODERN THEORIES

We have briefly traced the progress of thought in penology from the earliest times. The crude theories, or customary penal ordinances, of primitive societies afford ample food for reflection as to the primordial sentiment of justice, equality, retribution, expiation, betterment and the like, which underlie them. Coming to later times, we find that punishments assume diverse forms, and are administered in a perfectly arbitrary and autocratic manner. The classical and neo-classical schools represent the reaction against such arbitrariness. They succeed in evolving order out of chaos, and insist upon definite punishments answering to definite crimes. The severity of the punishment varies according to the heinousness (formidability) of the crime. At different times, endeavours are made to ameliorate the condition of those who suffer punishment, to make the treatment of convicted criminals more and more humane. Some of the punishments, for instance, are made less severe and the death sentence, which used to be inflicted for most of the offences including ordinary theft, is gradually abolished in many cases. But the viewpoint remains the same, namely, that the business of penology is only to supply the counteractive to the crime in the form of punishment. The Positive Criminal School, or the Italian School, represents the reaction against this view of penology. It makes the criminal, and not the crime, the principal object of study in penology. It also insists that the punishment must be adapted, not to the crime, but to the criminal. Further, the reaction of society is not necessarily to be in the form of punishments, but in the form of preventive measures which are, in appropriate cases, to be the substitutes for punishment.

The subsequent history of penology will be the adjustment of these two, namely, punishment and penal substitutes, in the practical scheme of legislative, judicial and administrative reconstruction. A mere barren theory is of little avail. The question that inevitably arises is how it will work itself out in practice. The test of the Italian school, as well as of the Classical school, will lie in its utility to practical penology. In the Italian school itself, it must be remembered, Garofalo raised his dissentient note and contended that Ferri's penal substitutes had no legitimate place in any juridical reconstruction. Either they were void of legal or juridical significance,

or they would trench upon the domain of legislation or government, which would be disastrous.

We have now reached a stage of thought in which the essential ingredients in the concepts of crime and punishment have come out in bold relief by reason of the controversy centring round them, and the searching analysis and criticism which controversy always provokes. Henceforth, all the schools of thought which appear—and there are a good many schools and sub-schools—emphasise one or other of the phases of thought through which the last stage was reached. One of them regards the classical idea of afflictive punishment, in the sense of vengeance, intimidation or expiation, as fundamental and indispensable. Another exalts the concept of responsibility not on the old metaphysical basis of free will but in a metamorphosed form, calling it the doctrine of identity or individuality. This view attributes to every man living in society a definite ‘character,’ or ‘identity,’ the result of the impact of forces—physical, psychical, and social—impinging on him, which he is free to uphold or violate as a responsible being. In other words, it attributes to him a kind of relative and not absolute freedom. A third school advances the doctrine of state tutelage in respect of the criminal, declaring that punishment, penal substitutes, or measures of safety, whatever they may be and however they may be called, are justifiable only on the basis of such tutelage. A fourth school dwells on the principle of ‘psychic responsibility,’ as distinguished from moral responsibility, the old idea, and from the point of view of psychic responsibility holds that punishment must remain. What is noteworthy is that all these schools show the marked influence on them of the positivist school of criminology, and a scientific rather than the time-honoured metaphysical trend in dealing with crimes or criminals. It is not possible in the course of these lectures, nor is it necessary, to deal with all these schools. We shall, however, touch on some of these and draw from them such help as may be necessary in the interests of practical penology, for our object is to get to their practical manifestations in the legislative, judicial and administrative spheres.

### THE ‘REFORMERS’

An interesting phase of thought is represented by the school of Liszt, Prins and Van Hamel. Bernaldo de Quiros calls this school the ‘Reformers,’ and observes “The reformers are noted for planning a kind of ‘double entry penology’.”<sup>1</sup> The double entry here spoken of refers to their two-fold attitude, namely, that for certain criminals the time-honoured penalties with the object of repression must be maintained, while for others preventive measures must be provided, in accord-

<sup>1</sup> *Modern Theories of Criminality*—p. 130. See also p. 131.

ance with the teachings of modern criminology, for preventing relapse or contamination. The number of thinkers who, in one form or another, favour this double entry, or are allied in thought, so far as respects the retention of punishment and measures of safety as two parallel and equally indispensable factors, is considerable. They are spread over various parts of Europe.

The reformers are in the majority everywhere. Among the most noted we may mention the late Tarde and La Grasserie in France ; Prins in Belgium ; Stoos in Switzerland ; Van Hamel in Holland ; Liszt in Germany ; Zucker in Austria ; Fayer in Hungary ; Drill in Russia ; Typaldo Basia in Greece ; Mendes Martins in Portugal ; Alcantra Machado in Portuguese America etc. In some countries special reviews have been founded, like Liszt's *Zeitschrift fur die gesammte strafrecht wissenschaft* ; Stoos' *Schweizerische Zeitschrift fur strafrecht*, or *Revue penal suisse* ; and the *Revue de Droit Penal et de Criminologie* in Belgium. In Italy, from Lucchini to Ferri, from the *Rivista Penale* to the *Scuola Positiva* the various shades of reforms succeeded in giving birth to a group called the Third School under the leadership of Alimena and Carnevale.<sup>1</sup>

The importance of this school in moulding informed public opinion in Europe should be appreciated. Liszt, Prins and Van Hamel founded at Paris in 1889 the 'International Union of Criminal Law' for the promotion of penal reform. The effect of the International Union was far-reaching. The activities of penologists did not remain within the boundary lines of their different countries. They took the form of a common human effort. Further, the Union laid down the principal canons of its creed which proved beyond doubt that the standpoint of the new penology which was being evolved rested on the characteristic results achieved by *both* the classical and the positivist schools, and that its future destiny was apprehended to be that it should fructify into many-sided reconstruction in the legislative, judicial and administrative spheres. It will, therefore, repay perusal. The creed as first formulated is as follows:—

I. The International Union of Criminal Law holds that criminality and the means of repression must be examined both from the social and the juridical point of view. Therefore, it aims at the realisation of this principle in the science of criminal law and in criminal legislation.

II. <sup>2</sup> The Union adopts as a fundamental basis for its activities, the following propositions: 1. The mission of criminal

<sup>1</sup> *Modern Theories of Crimnality*—p. 131.

<sup>2</sup> Later on it was thought that a detailed enumeration of all the sub-headings under Art. II was not necessary and in that view Art. II was shortened and made to stand as follows: "The International Union of Criminal Law holds that criminality and the means of combating it must be considered from the anthropological and sociological side as well as from the juridical. Its aim is to pursue a scientific study of criminality, its causes, and the means of attacking

law is to combat criminality regarded as a social phenomenon. 2. Penal science and penal legislation must, therefore, take into consideration the results of anthropological and sociological studies. 3. Punishment is one of the most efficacious means the state can use against criminality, although not the only one. Punishment must never be isolated from other social remedies nor must preventive measures be neglected. 4. The distinction between occasional and habitual criminals is essential in theory as well as in practice, and must serve as the basis for criminal law regulations. 5. Since repressive tribunals and penitentiary administration have the same ends in view, and since the sentence only acquires value by its mode of execution, the Union considers the distinction which the modern laws make between the court and the prison as irrational and harmful. 6. Punishment by deprivation of liberty justly occupying the first place in our system of punishments, the Union gives its special attention to all that concerns the amelioration of prisons and allied institutions. 7. So far as short sentences are concerned, the Union considers that the substitution of more efficacious measures is not only possible but desirable. 8. So far as long sentences are concerned, the Union holds that the length of the imprisonment must depend not only on the material and moral gravity of the offence, but on the results obtained by the treatment in prison. 9. So far as incorrigible habitual criminals are concerned, the Union holds that, independently of the gravity of the offence, and even with regard to the repetition of minor offences, the penal system ought before all to aim at putting these criminals for as long a period as possible under conditions where they cannot do injury.

III. The members of the Union adhere to these fundamental propositions.<sup>1</sup>

My reason for giving these principles on which the Union was founded *in extenso* is that they clearly visualise the penology of the future. The Union had its vicissitudes, but it continued till 1924 when through the initiative of the Faculty of Law of Paris it merged into the *Association Internationale de Droit Penal* which held its first Congress at Brussels in the year 1926.<sup>2</sup>

### THE FRENCH SCHOOL

Thus while it must be admitted that the first impetus for a comprehensive penal code and penal institutions combining the parallel claims of punishment and measures of safety came from Italy, the home of criminology from Beccaria onwards, other countries have since taken their due share in advancing the cause in their own characteristic manner. France through her strong contingent of penalists like Tarde,

it." But the detailed list is more expressive of the concrete activities of the International Union.

<sup>1</sup> *Modern Theories of Criminality*—pp. 132-133.

<sup>2</sup> See *Revue Internationale de Droit Pénal*, article by Enrico Ferri in No. 2 2mc. Trimestre 1927.

Saleilles, Garraud and Fouillée has adhered to the theory of penal responsibility, but in a considerably modified form, and has sought to introduce into her juridical and legislative system the humanising principle of individualisation. The theory of freedom and responsibility propounded by Gabriel Tarde and Raymond Saleilles is entirely different from the orthodox theory. Moral responsibility according to Tarde is based on personal identity and social similarity. What is to be understood by personal identity? Says Tarde:

Identity is the permanence of the person \* \* \* \* In order to make the nature of the personal individuality more clear, Ribot has compared it to organic individuality into which it thrusts itself by means of every one of its nerve roots and rootlets. It will remain to compare it to national individuality which is nourished and lives in it. These three individualities have this in common ; they imply a solidarity of elements and of numerous functions converging in a sheaf of ends, and they maintain themselves by means of a continual renewal of their elements and of their functions, in the same way as their ends, under more or less similar forms. \* \* \* The psychological individual, the 'myself' is an assemblage and a connection of states of consciousness or of sub-consciousness' \* \* \*. It is the 'myself' which are bound together by social ties and by legal ties ; it is the 'myself' alone which mutually serve one another as examples to be imitated or not to be imitated ; it is the 'myself' alone which are able to contract, to give, to make their wills and to commit crimes or do virtuous acts as well.<sup>2</sup> \* \* \* there is a most incontestable practical advantage in making responsibility rest upon identity which is a patent fact rather than upon liberty which is a latent force. Is that as much as to say that the idea of *individual identity* alone is sufficient? No, we must add to it *social similarity* as we shall see, and it is only in combining these two notions that we can find the plausible solution to the problem \* \* \*. Therefore, one indispensable condition for the arousing of the feeling of moral and penal responsibility is that the perpetrator and the victim of a deed should be and should feel themselves to be more or less fellow countrymen from a social standpoint, that they should present a sufficient number of resemblances, of social, that is to say, of imitative origin<sup>3</sup> \* \* \*. A certain similarity is a condition of responsibility in the moral sense of the word.<sup>4</sup>

Is it then a mere abstract notion—this moral or penal responsibility—a mere figment of the brain? Certainly not. Tarde observes that the knowledge that it is based on individual identity and social similarity does not take away from its force or validity, any more than the knowledge of the evolution of man from lower orders of species takes away from the fact of his humanity.

<sup>1</sup> Tarde's *Penal Philosophy*, p. 116.

<sup>2</sup> *Ibid.*, pp. 92-93.

<sup>3</sup> *Ibid.*, p. 88.

<sup>4</sup> *Ibid.*, p. 105

That, however, is the most solid basis of our thoughts. So that when I shall have conceded to the utilitarians that these ancient ideas of fault and of virtue, of worthiness and of unworthiness, of evil and of good, are infected with social subjectiveness, so to speak, it will not by any means follow in my opinion that the reality of things interpreted or symbolized by means of these ideas should have any the less weight and value. The day they shall have taught us to study geometry without the subjective and altogether mystical idea of space and mechanics without the ideas of space, time and force, I will be ready to admit that one can study sociology after having eliminated the ideas of good and evil. In the meanwhile I ask in what is the idea of force more clear than is the idea of duty?<sup>1</sup>

Thus Tarde, by an altogether different route, so to speak, arrives at the idea of moral good, or moral and penal responsibility which, in effect and in reality, has the same force in his opinion as the categorical imperative of Kant. Saleilles is the apostle of individualisation. He declares responsibility to be the basis of punishment and individualisation the criterion of its application. His responsibility is based not on free will but on the identity of self or personality. Hence free will passes away from the realm of scientific faith, yet responsibility remains.

Freedom is thus the personality itself in so far as it is capable of detachment from the organism that serves as its instrument, and thus comes to live its true life and to influence character and all the latent reserve forces that favour virtue and oppose vice.<sup>2</sup> Again,

The concept of punishment implies responsibility. One must believe in responsibility in order that a measure taken against an offender shall be a punishment. But the application of punishment is no longer a matter of responsibility, but of individualisation. It is the crime that is punished but it is the consideration of the individual that determines the kind of treatment appropriate to his case.

It is worth noting that there is a clear classical note in the observation that it is the crime that is punished. Yet the principle of individualisation which he advocated culminated in the law of parole, associated with the name of Berenger,—one of the earliest in the line of penal substitutes. Here again is another instance of an approach to measures of safety through the channel of the classical school.

#### THE GERMAN SCHOOL

Germany took a definitely anti-Lombrosian attitude at the start, so much so that in 1893 Kirn declared "To-day we can consider the type of the born criminal as absolutely destroyed". Nevertheless, it may well be asserted that the anthropological or individual factor of

<sup>1</sup> Tarde's *Penal Philosophy*, p. 105.

<sup>2</sup> *The Individualisation of Punishment*, p. 175.

the Italian school appears in Germany as the doctrine of 'endogenous' origin of crime of which Baer, Koch, Näcke and Kirn himself, as well as subsequently Ascheffenburg, are the advocates. True to her philosophical genius for accuracy she gradually built up a system of legislative sanctions paving the way for a larger scope for measures of social defence. Unhappily, the later history of penology in Germany has been one of continued depredations on the inalienable rights of man, individual and collective, through the operation of forces quite beyond ordinary foresight or control.

The changes that have come over fundamental notions of criminal jurisprudence are so far-reaching that they cannot but affect penal precepts or procedure. Some idea may be formed of these changes from the inaugural address delivered by Dr. F. Gürtner, Minister of Justice of the Reich at the XIth International Penal and Penitentiary Congress held at Berlin in August, 1935. The address is entitled "The Idea of Justice in the German Penal Reform". In it Dr. Gürtner indicates the different stages through which the reform of German Criminal Law passed in recent times until it attained its climax under the National Socialist Government:

\* \* \* You will be glad to learn something of the ideas which will dominate over the new German Criminal Law. As you are perhaps aware, systematic preparations for a reform of the entire Criminal Law have been in progress in Germany for more than thirty years. The first draft prepared by an official commission was published so long ago as 1909; further drafts followed in 1913, 1919, 1922 and 1925. In 1927 the then German Government laid the draft of a German Penal Code before the Reichstag, which busied itself for years with this draft, but the differences between the political parties always prevented the achievement of any legislative results. It was not until after the National Socialist Government had got rid of party quarrels that the basis for the successful achievement of the great work of reform was secured.

\* \* \* \* \* It is thus to be expected with certainty that the great work of reform will be concluded at no distant date. Germany will then have created a system of modern criminal legislation in accordance with the political and cultural views now prevailing in this country.<sup>1</sup>

Dr. Gürtner then proceeds to give two striking illustrations in order to show how the new law has changed the whole perspective. The first relates to the hitherto accepted doctrine *nulla poena sine lege*, and Dr. Gürtner thus portrays his country's present attitude towards it:

I shall begin with Germany's attitude to the fundamental question of finding a just decision. The Penal Code of the German Reich at present in force contains, in § 2, the following famous legal maxim. 'A punishment can only be inflicted for an act, if

<sup>1</sup> *Proceedings of the XIth International Penal and Penitentiary Congress*, pp. 5. 6. Staempfli & Co., Printers, Bern (Switzerland), 1937.



this punishment was laid down by law before the act was committed.' You all know this legal maxim ; it was already contained in the French 'Declaration of the Rights of Man', and it is repeated in the Italian Penal Code of 1930, the Polish Code of 1932 and the French Draft of 1934. It was also retained in all German drafts of a new Penal Code published up to 1930. The well-known Bavarian Criminalist Feuerbach expressed this legal maxim in the well-known phrase *nulla pœna sine lege*. The maxim has been generally recognised, especially since the period of enlightenment. Enlightenment regarded this maxim in the first place as a protection against judicial arbitrariness from which people had frequently suffered in previous centuries, but then also as a guarantee of the liberty of the individual as against the State. As you know enlightenment demanded that the individual must be allowed to retain a degree of liberty as extensive as possible and not restricted to State interference, a non-State sphere within which the individual can develop and enjoy himself freely. In the desire to extend the range for the enjoyment of this personal liberty of the individual, as far as possible, and to secure it against the State to the greatest possible degree, it was demanded that the State should only interfere with liberty by means of laws, namely, clearly defined laws which enabled every individual to estimate in advance the consequences of his behaviour. The clarity and the possibility of reckoning the consequences of the laws were regarded as the best protection of the liberty of the individual and also of legal security. But if the individual was to be free to move within the framework of the laws, and be able to adjust his behaviour in accordance with them, it was necessary that the laws should be interpreted strictly in accordance with their text. Hence the judges were called upon to interpret the laws literally, any free interpretation had to be treated as beyond their capacity and disapproved of as an incursion into the sphere of the legislator. The doctrine was that the judges were only entitled to interpret the law ; law-giving was reserved for the legislature, that is to say for a different authority from the judicial authority. \* \* \* \* The practical result of these doctrines is as follows: If the judge finds no penalty prescribed by the law for the case which he has to decide, he must acquit the accused, however deserving of punishment he may consider him to be, and, further, even if he is firmly convinced that the legislator wished to punish this case, and would have provided a punishment if he had included a case of this kind among the matters under consideration. The only thing left for the judge to do is to content himself with the thought that he is not entitled to intervene in the sphere of the legislator and that he must leave it to the legislator to provide the punishment which is lacking up to the present. \* \* \* \*

*The future German Criminal Law will release the German judges from being closely bound by the text of the law. We considered this loosening so important in the interests of justice that we have already undertaken it by a modification of the existing Penal Code, which will come into legal force on the 1st September*

<sup>1</sup> *Proceedings of the XIth International Penal and Penitentiary Congress,*  
pp. 6-8

of this year. The fundamental importance of this step cannot be too highly estimated. It entails a complete evolution in the domain of the doctrine of illegality and a complete re-arrangement of the relationship of the judge to the law. \* \* \* Hence a wrong is possible in Germany in future even when no law threatens it with punishment. Even when there is no threat of punishment every infringement of the vital aims adopted by the national community is a wrong.<sup>1</sup>

Another radical change of orientation indicated by Dr. Gürtner related to the penalising of criminal intention, even though it does not materialise in a criminal act. The German Penal Code, as it previously existed, was somewhat on the same lines as other Penal Codes in Western countries which visited mere attempts, when not attended with the Criminal Acts contemplated, with lesser penalties. The observations of Dr. Gürtner, at the Congress, clearly elucidate the extent of the change which has come over the present law.

The coming German Penal Code abandons this sphere of thought because it believes that it is unable to reconcile these ideas with the sense of justice. Justice demands that all guilt should be suitably atoned for. If this demand is to be realized, then a rearrangement of the existing Criminal Law is required. The judge must be instructed in every case of a voluntary act to adapt the punishment to the intensity of the criminal intention and, in the case of a careless act, to the extent of the thoughtlessness or indifference, and hence always to assess in conformity with its nature and extent, only according to the guilt and not according to the result. \* \* \* The practical consequence of this view will be, in particular, that the law will get rid of the existing offences depending upon the result having been achieved and, further, that in the case of an attempt it will provide the same penalty as in that where the offence has been accomplished. It shall not be *prescribed* that the judge shall assess the penalty in the case of an attempt in the same way as in that of an offence which has been accomplished, but he will be *in a position to do so*.<sup>2</sup>

#### STATE TUTELAGE

One of the features of present day penal reforms is their widespread character. They are not restricted to one particular country. All over the civilised world, according to the genius of each nation and in response to the conditions and requirements of each country, characteristic measures of various kinds are being adopted not only defensive in relation to society but protective and reformative with reference to the individual offender. The rise of national and international organisations with their published organs for dissemination of their views, and the literature originating from the members of these bodies have made

<sup>1</sup> *Proceedings of the XIIIth International Penal and Penitentiary Congress*, p. 10. The italics are mine. Cf. Lec. VIII—Soviet Russian Code.

<sup>2</sup> *Ibid.* pp. 14-15.

knowledge and experience in matters of criminology and penology universal property. The International Union of Penal Law, and the Societe Generale des Prison of France, the American Institute of Criminal Law and Criminology, the Association Internationale de Droit Penal, the Howard Society of England, the American Prison Association, and various other bodies, not to speak of the international Congresses held at different centres from time to time,—all contribute to this end.

Through all these endeavours there is a consciousness growing in intensity that the measures of defence contemplated should be such as to place the offender under the 'tutelage' of the State. It will at once be perceived that this is radically different from the orthodox idea of punishment. It has, on the other hand, substantial affinity with penal substitutes or preventive measures for social hygiene. It is difficult to trace the exact beginnings of this movement in Europe or America. But perhaps Karl Roder (1806-1879) was the first<sup>1</sup> to publish a series of writings applying the universal law of tutelage over deficient beings to criminals, on the basis that criminality points to an abnormal condition. The tutelage that Roder recommends as being necessary for the criminal is not to take the form merely of restricting his freedom, i.e., by imprisonment or other means, so as to diminish his opportunities for wrong-doing. That would be only negative in character. It should be positive so as to protect and foster the development of his freedom, "the repression of his will, the regeneration of his conscience, the restoration of the sense of justice in his soul, and his energy and strength in the realisation of his deeds". Roder does not omit from consideration the fact that in order that such regeneration may be effected, it is necessary to get the co-operation of the criminal himself. But even when he is unable to appreciate that the measures, whether restrictive or otherwise, are intended for his welfare, they must, if conceived and executed in the right spirit, prove beneficial to him and to society at large.

Whether the delinquent will consider this punishment—this tutelage—as an evil or as a blessing, will depend only on the state of his mind. The moral temper of his sentiments will make him capable or incapable to know his true interest, his aversion from the remedy being always in inverse ratio to that inspired by his crime. To consider punishment an evil for the delinquent, would be the same as to agree with the patient when through ignorance he detests the medicine, or with the child when he cries because forced to go to school.

The bulk of the reforms to-day, as we shall see in due course, has this idea of tutelage at its bottom. These measures are adopted by the

<sup>1</sup> *Modern Theories of Criminality*, p. 126.

State not only against the so-called irresponsibles, such as the insane, the imbecile, the mentally defective, the child or the adolescent criminal, in the shape of special legislation and appropriate institutional treatment; but also against those who have hitherto been regarded as 'responsible' but who are now more and more recognised as deserving of tutelage on the ground that they suffer from some abnormality which explains their being at war with established law and order. The mental infirmaries, the Borstals, the reformatories, the certified schools, are all parts and parcels of the legislative and the administrative realisation of the principle of tutelage, or of measures of safety aimed at the irresponsibles; while the system of preventive detention, of parol and the like, are manifestations of similar activity aimed at the so-called responsables.

It has, however, taken long years for this idea to grow on the minds of legislators, judges and administrators. The repressive or intimidative idea of punishment refused to be in any way minimised or counteracted. Apart from 'responsible' criminals in regard to whom the sternness of the orthodox attitude could be excused, even the irresponsibles were for a long time regarded as fit to be dealt with by punitive measures in the interests of social well-being. One of those who in the beginning of this century were responsible for initiating measures for quasi-irresponsibles such as adolescent offenders, Sir Evelyn Ruggles-Brise, vividly portrays in his book entitled *The English Prison System* the slow growth of the idea of state tutelage and the long and vigorous opposition it received from all quarters including High Court Judges of eminence. We shall have occasion in a subsequent lecture to deal in detail with the legislation concerning child offenders and adolescent offenders, and the law as it stands now. It will suffice to give here only one instance which will remain as a landmark in the history of measures of tutelage. Referring to the thirties of the last century, and to the establishment of a prison at Parkhurst for young offenders, Sir Evelyn Ruggles-Brise observes:

The public conscience had begun to be stirred by the terrible sentences of transportation passed on mere children and youths for periods as much as 15 to 20 years for what we should now regard as petty offences. The Parkhurst Act of 1838 contained a clause which has become historical and is known as the pardon clause. By this, the Secretary of State was able to pardon any young person sentenced to transportation on condition that he should place himself under the charge of a benevolent Association. The benevolent Association of those days was known as 'The Philanthropic Institution' which was the parent of the famous Red Hill Reformatory School of today. The number of lads, however, sent to Parkhurst was comparatively few, and the absence of any means of dealing with the great mass of juvenile delinquency began to be recognised by thoughtful and humane persons, and in 1847

a Parliamentary Committee was appointed to inquire into the question of juvenile crime. It was before this Committee that the authorities of the Stretton Colony<sup>1</sup> gave remarkable evidence which, at the time, came as a new light to a generation whose imagination had not been quickened to perceive the possibilities of reform in the case of youthful offenders. They stated in evidence that "their experience had been with prisoners between the ages of 16 and 20 with whom they had been dealing since 1815, and that no less than 60 in every 100 might be permanently reformed and restored to society, whereas the ordinary prospect that awaits these youths under the ordinary prison system is a life of degradation, varied only by short terms of imprisonment and terminating in banishment or death". It may be that the eyes of the Committee were opened by this simple statement of fact. We know that they took a step which is of singular historical interest. They formally consulted the High Court Judges as to the possibility of introducing a reformatory element into prison discipline. The High Court speaking in the names of its most distinguished members, Lord Denman, Lord Cockburn and Lord Blackburn declared reform and imprisonment to be a contradiction in terms, and utterly irreconcilable. They expressed a doubt as to the possibility of such a system of imprisonment as would reform the offender, and yet leave the dread of imprisonment unimpaired.<sup>2</sup>

The above account will show how, as late as 1847, the repressive and afflictive idea of punishment was fully alive in England. Later, in 1863, the memorandum appended to the report of the Royal Commission by Lord Chief Justice Cockburn reiterated the primacy of punishment and laid down the principles which in his opinion should govern the punishment of offenders. He observed:

These purposes are twofold, the first that of deterring others exposed to similar temptations from the commission of crimes; the second, the reformation of the criminal himself. The first is the primary and more important object, for though society has, doubtless, a strong interest in the reformation of the criminal and his consequent indisposition to crime, yet the result is here confined to the individual offender, while the effect of punishment, as deterring from crime, extends not only to the party suffering the punishment but to all who may be in the habit of committing crime or who may fall into it. Moreover, the reformation of the offender is in the highest degree speculative and uncertain, and its permanency, in the face of renewed temptation, exceedingly precarious. On the other hand, the impression produced by suffering inflicted as the punishment of crime, and the fear of its repetition are far more likely to be lasting and much more calculated to counteract the tendency to the renewal of criminal habits. It is on the assumption that punishment will have the effect of deterring from crime that its infliction can alone be justified, its proper and legitimate purpose

<sup>1</sup> Founded in Warwickshire in 1815.

<sup>2</sup> *The English Prison System*, pp. 88-89.

being not to avenge crime but to prevent it. The experience of mankind has shown that, though crime will always exist to a certain extent, it may be kept within given bounds by the example of punishment. This result it is the business of the lawgiver to accomplish by annexing to each offence the degree of punishment calculated to repress it. More than this would be a waste of so much human suffering ; but to apply less out of consideration for the criminal is to sacrifice the interests of society to a misplaced tenderness towards those who offend against its laws. Wisdom and humanity no doubt alike suggest that if, consistently with this primary purpose, the reformation of the criminal can be brought about no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of penal discipline, should be kept in due subordination to its primary and principal one. And it may well be doubted whether, in recent times, the humane and praiseworthy desire to reform and restore the fallen criminal may not have produced too great a tendency to forget that the protection of society should be the first consideration of the lawgiver.<sup>1</sup>

Fifty years wrought a great change in the attitude of the legislature, the judiciary and the administrators of Great Britain. We find an altogether different note in the following statement of Mr. Winston Churchill, the Home Secretary, in the House of Commons in 1910, which represents the change in point of view:

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal against the State ; a constant heart-searching by all charged with the duty of punishment ; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment ; tireless efforts towards the discovery of curative and regenerative processes ; unfailing faith that there is a treasure if you can only find it in the heart of every man—these are the symbols which, in the treatment of crime and criminals, mark and measure the stored up strength of a nation, and are sign and proof of the living virtue in it.<sup>2</sup>

#### THE BRUSSELS CONGRESS, 1926

In dealing with the question of Punishment *versus* Measures of Safety I desire to draw your attention to the deliberations on the subject at the First Congress of the International Association of Penal Law, held at Brussels, at which twenty-four states from all parts of the world and forty nationalities were represented by 350 eminent jurists. The resolution on the question of Measures of Safety *versus* Punishment was framed with the greatest possible caution so as not to outrage existing views. According to the positivist penalist, moral responsibility is not

<sup>1</sup> Quoted by Sir Evelyn Ruggles-Brise in *The English Prison System*, pp. 32-33.  
<sup>2</sup> *Ibid.*, p. 4.

within the competence of the state and, as Ferri would say,<sup>1</sup> falls outside its purview. Essentially a determinist, he would recommend measures of safety and not punishment. In the eyes of the classical penalist, however, punishment still retains its majesty and exceeding efficacy, and measures of safety stand on the footing of a dangerous experiment. Between these two extremes there is a large range of opinion of varying shades and intensities for or against measures of safety. Hence the need for great circumspection on the part of those who drafted the resolution, which said that punishment and measures of safety were to be matters of jurisdiction with power given to the judges to apply the one or the other according to circumstances, and the act and the personality of the offender.<sup>2</sup> Now this very proposition about jurisdiction had already been adopted by the German, Swiss and Austrian legislative projects which allowed the judge the discretion to substitute measures of safety for punishment and *vice versa*. Yet the resolution was subjected to formidable criticism and the opposition to it was led by men of eminence and experience whose names are well-known in modern penology. Hardly any conceivable point of attack was lost sight of during the debate. One,<sup>3</sup> for instance, raised the time-worn objection that retribution and intimidation ought to be the immediate object of criminal sanction and contended that, if measures of safety were at all to be resorted to, it should be only in the case of occasional or 'passional' offenders. Another<sup>4</sup> formulated the typically classical proposition, as expressed in L. C. J. Cockburn's Memorandum<sup>5</sup> that measures of safety were necessarily restricted in their operation and that punishment had a wider sweep altogether, for it contemplated not only its effect on the offender's mind but also on those of his neighbours. Still another<sup>6</sup> raised the point that in the then state of public opinion, punishment *qua* punishment was essential and must be retained on grounds of public policy. If punishment were discarded the law would run counter to public opinion. In that event not only might the law lose its hold on the people, but it might give place to

<sup>1</sup> 'Mais je pense que la mesure de la faute morale n'est pas de la compétence de l'Etat qui n'a que le droit et le devoir de défendre la société contre les criminels par la menace d'une sanction contre l'action délictueuse—*Actes du Congrès* p. 538.

<sup>2</sup> "La peine et la mesure de sûreté doivent être des actes de juridiction avec faculté laissée au juge d'appliquer l'une ou l'autre suivant les circonstances du fait et la personnalité du prévenu" *Actes du Congrès* 5. 540.

<sup>3</sup> Thomas Givanovitch, Professor of Criminal Law in the University of Belgrade.

<sup>4</sup> Megalos Caloyanni, formerly Counsel of the High Court of Cairo and President of the Hellenic group of delegates to the Congress.

<sup>5</sup> See *supra* pp. 17-19.

<sup>6</sup> This view was pressed by M. Milota, Professor of the University of Bratislava, as also by M. Mercier, Professor of the University of Lausanne. *Actes du Congrès* pp. 546-48; pp. 551-53.

lynch law. Law must evolve gradually and not by violent catastrophic changes.

Lastly, there was a point raised at the Brussels Congress which to me, as one familiar with the ancient idea of expiation in Hindu penology, proved of profound interest. Prof. Enrico Ferri declared that, as ethical considerations had no place in law, a system of punishments which could only have moral responsibility for its basis was equally outside the purview of law or legislation. Law, he said, corresponded to the idea of moral responsibility while measures of safety corresponded to the idea of social defence.<sup>1</sup> This was met<sup>2</sup> by the objection that Prof. Ferri was confusing 'moral' with 'psychic' responsibility. One could separate law from morality but it was impossible to separate them from psychic phenomena. In other words, what counts is the consciousness of the offender himself that by his act he has justly incurred the disapprobation and censure of society in the form of punishment. Whether it is designated punishment or measures of safety it comes to the same thing. Unless and until the offender willingly accepts it in the spirit of expiation, it is void of effect on him. As was observed by another<sup>3</sup> in the same debate: "The maxim 'To pay one's debt to society' proves that in the mind of the masses there exists the sense of responsibility". Looked at in this light of a willing expiation, punishment is justified. But in that case it loses its character of punishment, as ordinarily understood. Indeed, it becomes a species under the genus measures of safety (*mesures de surete*) which has for its objective not only the treatment and reformation of the offender but also the health and wholesomeness of society through one grand scheme of *l'hygiene preventive*. And such treatment and reformation can only be successful when the co-operation of the offender is obtained through his consciousness that he has done wrong and must expiate for his offence (psychic responsibility).

<sup>1</sup> *Actes du Congres* p. 538.

Cf. Ferri, *Criminal Sociology* p. 112.

"Penal substitutes should become the main instruments of the function of social defence, for which punishment will come to be secondary means, albeit permanent. For in this connection we must not forget the law of criminal saturation which in every social environment makes a minimum of crime inevitable, on account of the natural factors inseparable from individual and social imperfection. Punishments in one form or another will always be for this minimum, the ultimate though not very profitable remedy against outbreaks of criminal activity." In some of his later writings he appears to have outgrown this view and favoured measures of safety as sufficient by themselves to be able to replace punishments in the long run. This accounts for his taking up the position at the Brussels Congress that punishments *qua* punishments have no place in law or legislation.

<sup>2</sup> By Prof. Givanovitch of Belgrade. See *Actes du Congres* p. 542. For Ferri's answer see p. 531.

<sup>3</sup> Paul Matter, Advocate General of the Court of Cassation and Chief of the French Delegation—*Actes du Congres* p. 545.



## THE NINTH INTERNATIONAL PENITENTIARY CONGRESS, 1925

At the Ninth International Penitentiary Congress held in London in 1925, Lord Haldane dwelt on this aspect of what is at present the most outstanding problem of practical penology, and made the following weighty statement:

Punishment may have a significance that is retributory and it may also have a significance that is reformatory. The two need not always conflict and it may be right to take both aspects into account.

I submit to you that the theory of punishment is a complex theory that cannot be brought under one simple or exclusive definition. Besides the two aspects of which I have spoken, the retributory and the reformatory, there is another quite distinct from both. Punishment may become for the criminal his own act of expiation. In this aspect it gets a wholly new quality, a quality which seems to have been too little considered. In accepting his suffering, in the form of restriction of his liberty or even the loss of his life, the prisoner is accepting the principle which society has laid down and, if he does accept the result of the law, he is identifying his will with the will of his fellowmen. More than this, he is submitting to his punishment as a reparation made to the fellowman against whom he has sinned in the crime he has committed. This aspect of his punishment is real for the culprit only if he has adopted it, and it can profit his mind only if he has adopted it *ex animo*. But if he does this it may even be a source of comfort and of peace to him, and a starting-point on the way of reformation, which has its origin in retributive justice. The principle which interprets punishment as an act of reparation, done by the criminal himself in submitting to the act of the state, is a principle which affords a new opportunity of doing good, a kindness in making this intelligible to him on the part of the prison chaplain or whoever takes his place. For here is a chance of awakening the conscience of one who has done wrong in a simple fashion, unembarrassed by the demands of any particular religious faith. For morality is different from religion and can hold independently of it. The submission suggested to the criminal is based on ethical rather than on religious grounds, and it need provoke no antagonism on grounds of theory.<sup>1</sup>

We shall see later on what an ample space this idea of expiation, or 'psychic' acceptance of the fitness of punishment by the offender, occupies in ancient Hindu penology. As regards the educative aspect of punishment as expiation, Lord Haldane further observes:

No doubt punishment conveys a lesson to the public. But that lesson is more than one of intimidation only. It should inculcate, for the criminal and the outsider alike, a recognition of the true nature and moral quality of the deed. The criminal must

<sup>1</sup> *Proceedings of the Ninth International Penitentiary Congress, held in London in August 1925, published at Bern under the auspices of the Bureau of the International Prison Commission, by Staempfli & Co. (1927)—p. 278.*

be led to say, if it be possible, not only that he has been a fool, but that he has been a sinner and has been rightly served in the eyes of decent people. The educative effect of punishment thus depends on the recognition of its justice, and its justice does not depend merely on its educative effect. The 'serve him right' sense has to be awakened.<sup>1</sup>

The 'psychic responsibility', referred to above, as distinguished from moral responsibility, points to a state of mind of the offender which enables him to feel: 'I am paying my debt to society' by undergoing this punishment; or 'They have served me right' by awarding this punishment. An attitude such as that is the one most favourable to his own reformation. Indeed, it is the expiatory idea which is imbedded in it. And it has the effect of bridging the gulf between punishment and penal substitutes or measures of safety. When we come to study the methods of prison discipline which legislation in various countries has visualised, we shall find that this idea is often operative at the bottom. But side by side with it we have still the orthodox idea of afflictive punishment based on the principle of vengeance, or at any rate intimidation. The old school of thought is not dead. There are still many who hold the view, not only in the Continent as we have seen but also in England, that we must not lose sight of the idea that punishment is meant primarily to inflict pain. This was clearly brought out by Lord Cave, Lord Chancellor of England, in his address on Indeterminate Sentence before the Ninth International Penitentiary Congress in London.<sup>2</sup> He said: "Our people still regard the criminal not as an unfortunate invalid who should be subjected to curative methods, but as an offender against the public good; and the idea of punishment as an element of the penal law is not obsolete in this country."

#### SUBSIDIARY SCHOOLS OF THOUGHT

It now remains to mention a few more of the characteristic theories of crime and punishment which may be regarded as variations of the typical ones already discussed. They are ultimately derived from the anthropo-sociological philosophy of crime developed by the Italian or Positivist school. They, however, emphasise one or other of the factors that are said to generate crime.

The group called by De Quiros the anthropo-sociologic theories is represented by thinkers of the class of Lacassagne, Aubry and Dubuisson. "Social environment", says Lacassagne, "is the heat in which criminality breeds; the criminal is the microbe, an element of

<sup>1</sup> *Ibid.*, p. 280.

<sup>2</sup> In August 1925. But his statement is by no means obsolete today among an influential section of the people of Great Britain.

no importance until it meets the liquid that makes it ferment \* \* \* \*

"Communities possess the criminals whom they deserve". Another group of which Vaccaro is the leading exponent stresses the failure in adaptation of the individual to the social environment, as the cause of criminality. "Such lack of adaptation," says Vaccaro, "is due to a kind of degeneration: The Darwinian laws of selection and of the survival of the fittest, although applicable to human society, have been until now, are still and will be for a long time applicable with such restrictions and attenuations that, in most cases, together with a progressive and ascending selection, one meets a reverse process, that is, a descending and retrogressive selection, a true degeneration". Society seeks to counteract the degeneration by means of punishment prescribed by law. But legislation is inspired by class interests: the party in power, the strong, the opulent, the influential determines it. Hence criminal laws are hardly, if ever, aimed at defending the entire social body. It is only the powerful or favoured few whose interests are served by law. Social defence is a misnomer. The term 'legal defence' is more in conformity with the real facts of life. Therefore, says Vaccaro, "it often happens that the fittest, physically and morally, succumb and the mediocre or the unfit triumph, favoured by wealth or by other casual circumstances".

From this theory to the socialistic theories is but one step. An interesting variation of the socialistic view may be noticed before we come to the typically socialistic ones. It is Max Nordau's well-known theory of parasitism. "For me," says he "crime means human parasitism, using the word in the analogical and not in the purely biological sense. \* \* \* We find very few species among which cannibalism does not appear other than as an exceptional or visible pathological aberration. Man is not a cannibal by nature." How then is human parasitism to be explained. Ordinarily, man takes recourse to the animal and vegetable resources, which nature makes available to him, for his sustenance. But it so comes to pass that in so-called civilised life all men do not always get a free and adequate supply of nature's resources. There are some who grab all the land and water, and all that they contain, within a particular zone. The others have to obtain their provisions by personal recourse to the former. They would rather work for their living than beg it of their neighbours. They seek to obtain what they want by offering their services in return. Thus society is gradually converted into a kind of co-operative society in which every one works for all and in return gets from the common production what he needs. As co-operation depends on mutualism, there is no parasitism so far. "Parasitism begins only when in this co-operative society there appear men who wish to take

without lending anything and who take away from others 'the fruits of their labour without their consent and without any compensation. In short, they, are men who treat other men as raw material from which they may satisfy their needs and appetite. And the criminals are the ones who precisely fall under this parasitism''.

That criminality, through poverty, is due to a scarcity of the means of subsistence is the pet view of all socialistic thinkers of the Continent and elsewhere. "Knavery", says Salillas, "follows a basal deficiency of the nutritive basis of subsistence". Similarly Turati, Loria, Colajanni make the economic factor solely or primarily responsible for crime. While it may freely be admitted that theft and a good many other offences against property may be traced to the unequal, or even iniquitous distribution of natural resources in present day society there are a good many other formidable crimes such as crimes of blood, crimes of lewdness, crimes of passion which cannot be explained by it. The one-sided view which these theories degenerate into is apparent from sweeping statements such as this: "When this environment is modified, when the iniquitous bourgeois society is overthrown and the socialistic ideal is realised, then misery will end and the motives for crime will be wanting, education ending by turning men into angels". Ferri in his later writings contributed not a little to pointing out the effect of economic mal-adjustments of society. But he invariably recognised it as only one of the factors in the causation of crime. He never indulged in the wild fancy that with the advent of socialism the millennium will come and crimes will disappear altogether. He observes: "That with socialism will disappear each and all forms of crimes is an affirmation due to a generous sentimental idealism which is not based upon strict scientific observation".<sup>1</sup>

<sup>1</sup> Ferri, *Socialism and Positive Science*.

## LECTURE V

### PENAL SCIENCE IN ANCIENT INDIA

Science transcends geographical boundaries. The science of penology has evolved in different forms, at different epochs and in different countries, but its fundamental problems are the same everywhere. From the last century onwards, this universal aspect of penal science has become more and more predominant. Each country has developed its own theories of crime, its own methods for combating it. These, to a great extent, may be attributed to its native genius—its national outlook, intellectual, emotional or active—its traditions, its moral and social values. The theories hitherto considered are the products of western countries, the fruits of western thought. But, in the last analysis, the fundamental questions to which they address themselves are universal. They are: What is the essential quality of crime, as distinguished from other breaches? How is crime to be combated—by applying defensive reaction to the crime, or to the criminal? Is the reaction to be by way of punishment, or by way of measures of security for social defence? In any event, how is it to be adapted to the individual wrong-doer? On what principles and by what methods is individualization to be effected?

In later lectures we shall carry on the discussion of the different approaches to these problems and the various solutions recommended—by means of legislative, judicial and administrative measures. But, before we do so, let us turn to our own country and trace the development of penal science and penal methods from ancient times to the seventeenth century A.D.

First of all, it is necessary to form an idea of the sources of penal law in ancient India and of the steps in the gradual course of its evolution.

#### ORIGINAL SOURCES

There is one original source from which, in theory, all law in Hindu jurisprudence emanates. It is the three Vedas<sup>1</sup>—Rik, Sāma and Yajur. Penal law is no exception to this general rule. The wisdom of the Vedas is believed to have come by inspiration to the seers of old who are significantly called *mantra-draṣṭārah*. Later, such knowledge was communicated—it became a matter of hearing,

<sup>1</sup> The general consensus of opinion places the Vedas at or about 2,000 B.C.

Śruti. Later still, it became Smṛti,<sup>1</sup> a body of recorded and remembered law. Thus the contact with the original source, the Vedas, was maintained through Śruti and Smṛti, i.e., tradition old and new. The Dharmasūtras<sup>2</sup> represent the concluding stage of the Śruti period and form the basis of the Smṛti period. They give expositions of the precepts of the Śrutis and lead on to the Smṛtis. Finally came the Dharmaśāstras.<sup>3</sup> These last made the Smṛti knowledge available to the lay public in a simple non-discursive form, and gave directions based on the assimilated knowledge coming from the Vedas.

It will appear from the above that, like all ancient systems of law, Hindu law of penology at its very inception must have been made up of precepts and ordinances which are partly religious, partly moral and partly legal in the strict sense of the term. But it would scarcely be correct to say so of Hindu penal law as it has reached us, for it makes a clear distinction between the sacred and the secular, between moral and religious transgression (pāpa) and juristic or legal transgression (aparādha). In this connection it is necessary to consider the observations of Sir William Macnaughten. He observes, "It by no means follows that because an act has been prohibited it should, therefore, be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible".<sup>4</sup> This passage was referred to by their Lordships of the Judicial Committee in the case of *Rao Bulwant Sing V. Rani Kishori*.<sup>5</sup> In a later case,<sup>6</sup> while drawing attention to it again, their Lordships proceeded to point out "the necessity of great caution in interpreting texts of mixed religion, morality, and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original lawgivers". The above wholesome warning applies not only to foreign lawyers and jurists but also to us Indians who, by reason of our training, have largely imbibed the spirit and the

<sup>1</sup> The date of the Smṛtis is roughly the second century B.C.

<sup>2</sup> and <sup>3</sup> The Dharmasūtras and the Dharmaśāstras are placed in the period between the sixth and the second century B.C.

All the dates above given are the generally accepted ones, irrespective of the controversy relating to them.

<sup>4</sup> Preface to Sir William Macnaughten's work on Hindu Law.

<sup>5</sup> (1898) L.R. 25 I.A. 69.

<sup>6</sup> *Sri Balusu Gurulingaswami V. Sri Balusu Rama Lakshamma & others*—L.R. 26 I.A. 113 @ p. 136.

principles of Western learning. While, however, it is useful to remember the warning, it is necessary to note the fact that in Hindu penal literature, at any rate, there is a clear appreciation of juristic wrong as distinguished from breaches of moral or religious laws and ordinances. We need not consider here the corresponding situation in regard to other branches of Hindu Law as it is outside the province of these lectures.

Moreover, it is most important at the outset to appreciate the special affinity of penal law with morals and religion. In regard to penal law the danger of mixing up law, morals and religion is not so great. As will appear clearly later on, the three hang together, and penal law must always keep contact with moral, and even religious, sanctions of the particular society which may evolve it. Hence it comes to pass that in the earliest stage, as well as in the latest, morals, religion and society are recognised as playing their part in Hindu penology. The only difference perhaps is, to use Hegelian phrasology, that while in the earlier stages we find them in a state of thesis, later there is antithesis and, finally, synthesis. It is all 'oughts' and 'ought-nots' at the initial stages. Positive law is in course of time differentiated from moral and religious precepts and also from ceremonial rules—from the vast mass of 'oughts' and 'ought-nots'. A similar process takes place in the realm of penology. When we come to the *Arthaśāstra* of Kautilya we find a synthesis in which, while recognising the background of religious injunctions, moral precepts and social conventions, penology is placed on a scientific basis which makes room for every one of these essential factors constituting penal concepts.

### CANONS OF INTERPRETATION

It is beyond the scope of these lectures to enter upon a detailed treatment of the methods of interpretation employed for practical conduct of life with the aid of the Vedas, the Śrutis, and the Smṛtis. For such treatment reference must be made to existing treatises on the subject. It may, however, be observed that, in the main, the positive law is to be found in the *Dharmaśāstra* or Smṛtis. They are regarded as embodying the substance of the Vedic texts that relate to conduct, and as being authoritative in view of the fact that they are in theory the Vedic or Śruti law, as remembered or recollected by the sages. Hence to follow the Smṛti is in effect to follow the Śruti or Veda. But difficulty may arise if there is conflict between Śruti and Smṛti, or between two texts of Śruti.

Accordingly, Manu lays down a few general canons of interpretation to which a passing reference may profitably be made :

*Śrutismṛtyudilāṁ dharmamanuṭiṣṭhaṁ hi mānavaḥ |  
Itha kīrtimavāpnōti prētya cānuttamaṁ sukhaṁ ||*

v. 9

“By practising dharma (right conduct) as inculcated in the Śruti and the Smṛti, man verily acquires fame in this life and supreme happiness in the next”.

*Śrutistu vedo vijñeyo dharmasāstraṁ tu vai smṛtiḥ |  
Te sarvārtheṣvāmāmsye tābhyaṁ dharmo hi nirbabhau ||*

v. 10

“By Śruti is to be understood the Veda, and Smṛti is meant dharmasāstra. The two must not be put to the test of logic, for all dharma (sacred law) emanated from them”

*Yovamanyeta te mūle hetuśāstrāśrayāddvijah |  
Sa sādhubhirbahiskāryo nāstiko vedanindakah ||*

v. 11

“The twice-born who, by dint of logic, tries to bring these root-śāstras into disrepute, shall be cast out as a heretical calumniator of the Vedas”.

Thus even when the path of duty is to be ascertained from Smṛti (tradition), its authority is to be traced to the Śruti. The following verses emphasise it :

*Sarvaṁ tu samavekṣyedaṁ nikhilāṁ jñānacakṣuṣā |  
Śrūtiprāmānyato vidvān svadharme nivīṣeta vai ||*

v. 8

“With the eye of knowledge, having scanned all these śāstras, the wise one shall perform the duties (proper to his order) in conformity with the proofs of the Śruti”.

*Vedaḥ smṛtis sadācāraḥ svasya ca priyamālmanah |  
Etaccaturvidhaṁ prāhussākṣāddharmasya lakṣaṇam ||*

v. 12

*Arthakāmeṣvaśaktānāṁ dharmajñānaṁ vidhīyate |  
Dharmaṁ jīṇāsamānānāṁ pramāṇaṁ paramaṁ śrutiḥ ||*

v. 13

*Śrutidvidhaṁ tu yatra syāttatra dharmāvubhausmṛtau |  
Ubhāvapi hi tau dharmau samyaguktau maṇiṣibhiḥ ||*

v. 14

*Uditenudite caiva samayādhyuṣīte tathā |  
Sarvathā vartate yajña itīyaṁ vaidikī śrutiḥ ||*

v. 15

*Sarasvatī Dṛṣadvatyordevanadyoryadantaram |  
Tam devanīrmitaṁ deśaṁ brahmāvartaṁ pravakṣate ||*

v. 17



*Tasmindese ya ācāraḥ pāramparyakramāgataḥ |*  
*Varṇānām sāntarālānām sa sadācāra ucyaṭe ||*

v. 18

"The Veda, Smṛti (tradition), usages established by good men, and the satisfaction of one's own (inner) self,—these are declared to be the fourfold basis of commendable conduct (V. 12). Knowledge of dharma (right conduct) is laid down for those who are unattached to wealth or pleasure ; for all inquirers after dharma, Śruti is the highest authority" (V. 13): It may be asked how one is to discover from the Śruti detailed rules for guidance. Admittedly, they are not there. For all practical purposes it is Smṛti which has really to be restorted to. Then again there may be conflict between texts. Commentators have directed their attention to this point, and have tried as far as possible to remove difficulties. According to Jāvala, where there is a conflict between Śruti and Smṛti, Śruti prevails, since the inference must be that tradition on that particular point has deviated from the right path laid down in Śruti. Where there is no conflict between Smṛiti and Śruti, then Smṛti remains authoritative, for the inference is that the Smṛti path is the Vedic path. The same reasoning is adopted by Jaimini.

Verses 14 and 15 above quoted refer to another possible contingency. "Where there are two precepts in Śruti, both are laid down in Smṛti as dharma, both indeed are called dharma (right) by the wise (V. 14). For instance, when the injunction is for the time of sunrise and for the time before sunrise as also for the time when there is neither the sun nor are the stars, the Yajña (prescribed) may be performed at all times." (V. 15).

Verses 17 and 18 are intended to define the limits within which sadācāra or recognised custom may prevail. The territorial limits are here laid down ; within those limits the customs or customary laws that prevail may be taken as good and binding, provided they do not clash with an express text of Smṛti. "The tract of country which lies between the Sarasvatī and the Dṛṣadvatī, the two celestial rivers, that god-built country is called Brahmāvarta. (V. 17). The conduct of life as it obtains from generation to generation in that country among the twice-born and among the mixed castes is called sadācāra (good or commendable conduct). (V. 18)".

It now remains to point out the function of the fourth criterion Ātma-tuṣṭi in V. 12. The same idea occurs in V. 6 of the same *adhyāya* of Manu.

*Vedokhilo dharmamūlaṁ smṛtiṣile ca tadvidāṁ |*  
*Ācāraścaiva sādḥūnām ātmanastuṣṭireva ca ||*

"The Veda is the foundation of all dharma, so the Smṛti (recollection) and Śīla (virtues) of those versed in the Vedas, so also the manner of living of good (pious) men, so again is the satisfaction of one's own self." The self-satisfaction mentioned as a criterion of right conduct is not the satisfaction felt by anybody and everybody but only by the pious (sādhūnām). This is the criterion in moral or religious matters. In the field of law it is of little help, as it does not lend itself to any objective examination or measurement. Nor is it meant to be so. In the absence of any guidance in matters of conduct (that do not bear on law) from the Veda, Smṛti, Śīla or Sadācāra the inner light that lights the righteous mind must be taken as the true guide. The result is that two tangible criteria emerge, namely, the texts of Śruti and Smṛti and well established usages. It is upon these that all positive law must ultimately depend. How these factors are utilised in the science of penology will appear as we proceed further.

Apart from the above sources of knowledge we have the Mahābhārata, which is often called the fifth Veda. It represents an attempt in the direction of imparting knowledge to the lay public, but without any definite differentiation of its various aspects, religious, ethical, social or legal. On a similar footing may be placed the Itihāsas and the Purāṇas<sup>1</sup> in which are found quasi-historical accounts of dynasties and outstanding personalities, of contemporaneous as well as bygone events, mixed up with precepts and ordinances of all kinds, and discourses on various subjects, social, moral, metaphysical and religious. The guiding principle laid down for this class of literature is that it must be read to supplement the Vedas of which they form the human background.

*Itihāsapurāṇābhyam vedam samupavṛnhayet |  
Vibhctyalpāśrutādvedo māmayaṁ prahariṣyati ||*

"The Veda is to be supplemented by Itihāsa and Purāṇa. Veda is afraid of the ill-educated lest they should do it harm".

## GRADUAL EVOLUTION OF SCIENCES AND OF PENAL SCIENCE IN PARTICULAR

The Sūtras are the first attempt to deal with topics on the basis of a proper classification into Dharma, Artha, Kāma and Mokṣa.

<sup>1</sup> Itihāsa would include the Mahābhārata and the Rāmāyaṇa in Sanskrit, the stories in Pali literature from the time of the Buddha to Asoka, i.e., from the sixth to the third century B.C. and the last original of the Brhatkathā in Pāli in Pāli. The extant Purāṇas belong to about the second century B.C. Says Kautilya :

Purāṇamitiṣṭtamākhyāyikodāharāṇām dharmasāstraṁ  
arthaśāstraṁ cetītiṣṭhaṁ

Under Dharma, as will now appear, we get the wider conception of *recht und sitte*, law and custom. Dharma is derived from the root *dhṛ*, to hold—it is that which holds, or maintains in order, the universe of things, every one and every thing in its proper place. Under Artha are treated principally the two subjects, Vārttā, Economics and Daṇḍanīti, Penal Science, of which we are concerned with the latter. The Śāstras which come after are only special studies of these subjects, viz., Dharma, Artha, Kāma, and Mokṣa, based on the Sūtras.

For our purpose we may say that the scientific starting point is furnished by the Sūtras, treating of Daṇḍanīti, penal science, with a clear conception of its separate claim and importance. Of these the earliest Sūtra on penal science is of Bṛhaspati of the 5th century B.C. The most important of the early dharmaśāstras is that of Manu as promulgated by Sumati Bhārgava about the second century B.C. Subsequent dharmaśāstras like Yājñavalkya about the fifth century A.D., followed by well-known commentators on Manu, such as Kullukabhatta and Medhātithi, about the 9th and 10th centuries A.D. led the way to the later stages of the Nibandhas or digests about the 11th century A.D.<sup>1</sup> These Nibandhas in their turn were commented upon by later Nibandhakaras right up to the 18th century.<sup>2</sup> All these contain for their subject-matter a variety of topics purporting to be under the four heads Dharma, Artha, Kāma and Mokṣa. In regard to penal science a similar line of development is traceable.

The existence of penal science and the names of the expositors are mentioned in the Mahābhārata.<sup>3</sup> In Kautilya's Arthaśāstra, 4th century B.C., he frequently quotes his predecessors, both schools and individuals, and in the body of the work, which often assumes the form of a discussion, he leaves no doubt that penal science was a recognised branch of knowledge, being comprehended within the larger subject of Rājadharmā, royal policy. The schools mentioned in the Arthaśāstra are the Mānavas, Bārhaspatyas, Auśanasas, Āmbhīyas and Pārāśaras; and the individuals are Bharadvāja, Viśālākṣi, Piśuna, Kauṇāpadanta, Vātavyādhi and Bāhudantiputra. Some of these, as above mentioned, occur in the Mahābhārata.

<sup>1</sup> Prominent among the Nibandhakāras or authors of digests were Viṣṇaśvara and Jimūtavāhana, the authors of the Mitākṣarā and Dāyabhāga respectively.

<sup>2</sup> Raghunandana in Bengal.

<sup>3</sup> This was pointed out in 1911 by Prof. Jacobi in the Berlin Academy Sitzungsberichte p. 973.

## BĀRHASPATYA SŪTRA

Of the sūtrakāras mentioned by Kautilya a text attributed to Bṛhaspati called Bārhaspatya Sūtra was published by Prof. Thomas in the Le Museon in the year 1915. There is some controversy regarding the authenticity of the work owing to references in it to the Yādavas of Devagiri of about the 12th century A.D. and the "Kusumāntas" of doubtful meaning ; also owing to some grammatical irregularities and to lack of confirmation concerning some of the topics referred to by Kautilya as being found in the Bārhaspatya text. On the other hand, it is pointed out that though it is incomplete and contains some interpolations, the style is archaic and the substance is in agreement with the information obtaining in the Mahābhārata, the Harivaṃśa and the Sūtra literature generally. In this respect it is somewhat like the Atharvaparīṣiṣṭa in which though there are stray references to later events, the substance is admittedly old.<sup>1</sup>

## THE ARTHAŚĀSTRA AND AFTER

Next in order of time, after the Sūtras of Bṛhaspati, we have the elaborate system of penology in the Arthaśāstra of Kautilya.<sup>2</sup> In Manu and Yājñavalkya we find further developments of penal science which were systematized in works like Śukranīti and Kāmandakiya Nitisāra. Subsequent developments leading practically up to the present time, and bearing exclusively on Daṇḍanīti are to be found in the Nibandhas of which the Daṇḍaviveka of Vardhamāna (about the 16th century A.D.) is one of the fullest. The last named work is a masterly compilation of the fundamental principles of Hindu penology as laid down from time to time up to the sixteenth century.

The sources on which Daṇḍaviveka rests are: *Sūtras* and *Sāstras* :—Angiras, Āpastambha, Uśanas, Kātyāyana, Gautama, Dakṣa, Devala, Nārada, Paiṭhinasi, Bṛhaspati, Bṛddhamanu, Baudhāyana, Manu, Yama, Yājñavalkya, Viṣṇu, Vaśiṣṭha, Vyāsa, Śankha, Śankha-Likhita and Hārita. *Commentaries* :—Kullukabhatta, Gārgīya Mānava, Govindarāja, Graheśwara Miśra, Chandeśwara, Dipikākāra, Nārāyana, Nārāyana-Sarvajña, Pārijāta, Bhatta, Bhavadeva, Bhāṣyakāra, Mahārṇavakāra, Mitakṣarākāra, Miśra

<sup>1</sup> Dr. F. W. Thomas afterwards Boden Professor of Oxford, on careful consideration of the main points of the controversy observes :—

"Upon the whole we should perhaps not be mistaken in maintaining that the text *does*, though rather remotely, derive from the ancient Bārhaspatya system."

<sup>2</sup> There is a controversy regarding the approximate date of this work. All things considered, it is usual now to place it in the 4th century B.C., about the time of the invasion of India by Alexander the Great.

Medhātithi, Rahasapāla, Rudra, Lakṣmīdhara, Bādarāyaṇa, Vijñāneśwara, Viṣṇu Gupta, Sūlapāni, Sarvajña, Harinātha, Halāyudha, and Hemādri. *Nibandhakāras* (from about the eleventh to the fourteenth centuries):—Kalpataru, Kāmadhenu, Kṛtyasāgara, Kṛtyasāra, Çaturvargacintāmaṇi, Dvaitaviveka, Parasparabhāṣyam, Pārijāta, Pradīpikā, Bhūpālapaddhati, Manutika, Mitākṣarā, Ratnākara.

## THE MAHĀBHĀRATA

The Mahābhārata is a veritable encyclopoedia of the life and knowledge of ancient India. Around the great historical war between the Kurus and the Pāṇchālas, which forms its direct subject-matter, there clustered gradually during a thousand or more years a vast mass of legends and tradition, episodes and anecdotes of legendary heroes, legal and moral codes, dissertations on metaphysics, ethics, sociology, astrology and political philosophy. This is how the Mahābhārata is found in the 5th century B.C. Amid this miscellaneous matter one cannot fail to discern the pre-eminent position accorded to Daṇḍanīti, penal science. We find the Mahābhārata replete with references to it as forming an essential part of Rājadharmā, royal policy. There is never a doubt entertained as to the efficacy of penal science or as to the place of punishment in sociology. It is almost accepted as an axiomatic truth that penal science is God-given to man for the maintenance of order in society. Its source is divine, its study and cultivation a primary duty with the King, and its application by the King is guided and controlled by definite principles. Prominent among these is the principle that penal law is to be closely controlled by considerations of social self-realisation. Indeed, from the Vedic days downwards the State stood guarantee for individual self-realisation. The goal of self-realisation varied with the Varṇa, caste, which classified the people into four distinct orders. Each had his own sphere—the Brāhmaṇa, the Kṣatriya, the Vaiśya and the Śūdra—his own code of conduct, his own sphere of activity, his own ideal, his own standard of self-realisation. True, some of the duties and responsibilities of citizens would be common to the four orders. But there would be others—duties to self, to family, to neighbours and to society at large—which were special and peculiar to each order. The observance or non-observance of these would bring on social approbation or disapprobation. Unlike most ancient systems, there were definite barriers between religious, moral or social trespasses or transgressions and legal trespasses or transgressions. Hence a breach of the law as laid down in Śruti or Smṛti raised no question

as to whether it was to be classified as an infraction of sacerdotal law, moral law, or social law. Law was from one and the same source and it had for its sovereign object the self-realisation of all, the good weal of society,—its maintenance, protection and advancement through the maintenance of the four orders in their proper spheres. But law is law and nothing else. It has its own canons quite independent of religion or morality.

### THE LAW OF KARMA

Another important factor to be considered is the belief in the all-pervading law of Karma. Buddhism sought to break down caste. But its view-point in regard to Karma remained essentially Brahminical and militated against laying down a standard of responsibility for human action based on the conception of absolute free will. Not absolute but only a relative freedom was attributed to human action. Individual responsibility came to be based on this relative freedom. Such responsibility could accordingly not be absolute but qualified and yet it could justify punishment. Thus the central idea in Hindu criminal jurisprudence from the very beginning was that punishment for wrong-doing was to be meted out by the King for the preservation of social order as it was conceived in ancient India.

### RĀJADHARMA AND DANDANĪTĪ

Penal science was accordingly regarded as a part and parcel of Royal policy (Rājadharmā)—a branch of knowledge dealing in great detail with the duties and functions of the sovereign and with the entire machinery of State, all the arts of construction and destruction, peace and war, from palace building, fort building and road making to military strategies and manœuvres, police and judicial administration, courts and councils, espionage and criminal intelligence, evidence and procedure, agriculture and economics and, along with all this, penology. The last named science had not yet attained the definite position in relation to other branches of knowledge such as we find in Brhaspati Sutra or in Kautilya's Arthaśāstra. But the following words, put into the mouth of Brahman, will show the semi-divine origin of penal science indicated in the Mahābhārata. "For the behoof of the world and for establishing the threefold object, namely, Dharma (right conduct), Artha (wealth or prosperity) and Kāma (pleasure), I have composed this science representing the very essence of Sarasvatī. Helped by punishment this science will protect the world. Meting out rewards

and punishments this science will do its work among men. And because men will be governed by punishment, therefore will this science be known in the three worlds as Daṇḍanīti."<sup>1</sup> The original composition by Brahman is said to have contained a hundred thousand lessons. But in view of the gradual decrease of the span of human life the divine Śiva abridged it and the abridgment containing ten thousand chapters only was called Vaiśālākṣa. "The divine Indra again abridged it into a work containing five thousand chapters and named it Vāhudantaka. Afterwards the powerful Br̥haspati by his intelligence further abridged the work into one containing three thousand chapters and named it Bārhaspatya. Next, the famous teacher of Yoga, Kavi, of unlimited wisdom abridged it further into a work of a thousand chapters. Considering the span of human life and the general decrease (of everything) thus did the great Ṛsis, for the well-being of the world, abridge that science."<sup>2</sup>

The divine or semi-divine origin of Daṇḍanīti described in the Mahābhārata is of a piece with the general trend of the great epic which casts a mythical halo over everything, including scientific studies. Yet it has its historical significance for, incidentally, the names of prominent personages associated with the gradual evolution of the science of penology are mentioned such as Viśālākṣi, Vāhudanta and Br̥haspati, the last named bringing the course of development down to the fifth century B.C.

### THE CONCEPT OF PUNISHMENT

What is the concept of punishment in the Mahābhārata? Is it based on the notion of vengeance, as in the Germanic systems? Or, is it rooted in the notion of social self-defence? On a proper analysis, it will appear that the ruling idea is the protection of society. Such protection rests with the King who is regarded as the divinely appointed authority, the very source and fountain-head of justice and equity. Indeed, he is Penal Providence incarnate. Daṇḍa or punishment is divested of its character of mere afflictiveness and stands for the means of ensuring the safety of society. Its object is not to inflict pain but to eradicate evil. It is certainly calculated to intimidate, to deter. It has a large admixture of the idea of expiation, as will presently appear from the elaborate injunctions given under *Karma-vipāka*, or working off the evil deed. In a crude form it contains within it the idea of correction; but correction plays a subordinate part in the scheme of *défense sociale* which is

<sup>1</sup> Mahābhārata, Śānti Parva Chap. LIX Verses 76-78.

<sup>2</sup> Mahābhārata, Śānti Parva, Chap. LIX verses 83-86.

the predominant object. Thus we find the most interesting phenomenon that, by an altogether different route from that followed by the Western systems of penology, social protection and well-being as the end of penology, and measures of safety as the means to that end, appear very early in Hindu criminal jurisprudence. The succeeding lecture will show how characteristically these two key-ideas work in the evolution of Hindu penology. At that distance of time in India the measures of safety were not elaborated with wealth of detail, or with conscious difference between the three standpoints, namely, punishment directed against the crime, punishment directed against the criminal and punishment aiming at social defence, as we find in the latter half of the nineteenth and the beginning of the twentieth century. Such conscious discrimination has come as the result of history and of the clash of conflicting theories of punishment in the Western countries. But the basic idea of social defence, in the larger sense, was clearly and unmistakeably there.

In the *Sānti Parva* of the *Mahābhārata*, Chapter CXXI headed *Rājadharmānuśāsana* (Duties ordained for the King), the character of *Danḍa* is delineated in words which make it difficult, if not inaccurate, to render it into English as 'punishment', specially in view of the retaliatory or afflictive idea which enters into the connotation of that English word. In the context in which it appears, it seems to be proper to render it as 'Penal Providence' or 'governance'. *Danḍa* is conceived as an entity, a being, almost a deity. In the following dialogue between *Judhiṣṭhira* and *Bhīṣma*, *Judhiṣṭhira* says: "O grand-father, you have now finished your discourse on the duties of Kings. From what you have said it appears that *Danḍa* occupies a high position and is the master of everything, for everything depends on *Danḍa*. It seems, O puissant one, that *Danḍa* which is most powerful and which is the foremost of all beings among either gods and *Ṛṣis* and great *Pitṛs*, and *Yakṣas* and *Rakṣas* and *Piśācas* and *Sādhvas*,<sup>1</sup> or living beings in this world consisting of beasts and birds. You have said that the entire universe mobile and immobile including gods, *asuras* and men, depends on *Danḍa*. O foremost of *Bharata's* race, do tell me: Who is Penal Providence? Of what kind is he? What is his form? What is his nature? Of what is he made? Whence is his origin? What are his features? How does he control? How again does he keep awake among living creatures so vigilantly? Who again remains awake maintaining this continuity? Who is recognised as the beginning of things, who this excellent one designated Penal

• <sup>1</sup> The four last named are believed to be powers of evil.



Providence? Wherein does Penal Providence reside? What again are said to be his ways?"<sup>1</sup> The answer to this long string of questions is given in the next few verses: "Listen, O scion of the Kurus, who is Daṇḍa and why he is also called Vyavahāra<sup>2</sup>. Daṇḍa is that by which righteousness is maintained. He is sometimes called Vyavahāra (Law). Daṇḍa is so called in order that the righteousness of the King who is wide awake may not suffer extinction."<sup>3</sup> The idea of divinity is further brought out thus: "Daṇḍa is the mighty Viṣṇu, the veritable Yajña (sacrificial rite), the Lord Nārāyaṇa. He is called the Great Being bearing an eternal mighty form. Daṇḍa, the daughter of the Supreme Being under diverse appellations such as Lakṣmī (Prosperity), Nīti (Moral Ordinance), Sarasvatī (Learning), Daṇḍanīti (Penal Ordinance) is made manifest in diverse forms and supports the universe."<sup>4</sup> Again, "There is nothing which deserves greater respect from kings than Daṇḍa by which the ways of righteousness are marked out. Brahman himself, for the protection of the world and for establishing the duties of the different orders, has sent down Daṇḍa."<sup>5</sup>

Behind this poetry and imagery there is a great deal which we shall presently see elaborated in scientific detail in Kautilya's Arthaśāstra. Lakṣmī or the goddess of prosperity stands here for the science of economics (Vārttā), which criminal science must take note of. Nīti or moral ordinance stands for the ethical sense of the good or bad, which criminal science obviously cannot ignore. Sarasvatī or the goddess of learning stands for the faculty of discrimination, which must enter into the judgment of acts as right or wrong. Daṇḍanīti or penal science in its comprehensive sense calls for exercise of one or more of these branches of knowledge.

<sup>1</sup> Ko daṇḍaḥ kīdṛśo daṇḍaḥ kimrūpaḥ kimparāyaṇaḥ |  
Kimātmakaḥ kathambūtaḥ kathammūrtiḥ kathamprabhuḥ ||

v. 5

Jāgarti ca katham daṇḍaḥ prajāsvavahitātmakaḥ |  
Kaśca pūrvāparamidaṁ jāgarti pratipālayaṁ ||

v. 6

Kaśca vijñāyate pūrvāḥ ko varo daṇḍasaṁjñitāḥ |  
Kimsaṁsthāśchābhavaddaṇḍaḥ kā chāsya gatimucyate ||

v. 7

Chap. CXXI headed *Rājadharmānuśāsana* in Śāntiparva verses 5-7.

<sup>2</sup> Cf. "Vyavahāra, or judicial proceeding, is that which by discriminating the good from the evil ministers to the virtues both of the people and the King and furthers their interest."

Śukranīti Chapter IV Sec. 5, verses 7-8.

<sup>3</sup> Mahābhārata, Chap. LIX, Verses 8 and 9.

<sup>4</sup> Daṇḍo hi bhagavān Viṣṇuryajño Nārāyaṇaḥ prabhuḥ |  
Śaśvadrūpaṁ mahad bibhiraṁ mahānpuruṣa ucyate ||

23

Tathoktā Brahma Kanyeti Lakṣmīr Nītiḥ Sarasvatī |

Daṇḍa nītirjagaddhātṛ Daṇḍo hi bahu vighrahaḥ ||

24

*Ibid* verses 23-24.

<sup>5</sup> *Ibid* Chap. CXXI Verse 49.

Indeed, it is "made manifest" in one or more of these forms according to circumstances. We shall see how this idea is developed later.<sup>1</sup>

#### CAPITAL PUNISHMENT : PILLAR EDICT IV

Apart from getting glimpses of the thought that underlay Daṇḍa we do not find in the Mahābhārata detailed directions on, or a scientific treatment of, the subject of government with the help of penal law. But there is enough evidence that the Hindu mind was trying to look at penology from the point of view of social defence and the maintenance of social order. The most exacting test of a nation's estimate of the place of punishment in social polity is its attitude towards capital punishment. In the spacious days of Buddhist monarchs when Ahimsā was the rule of conduct, there was an all-round protest against the taking of the life of any sentient being. Yet it cannot be said that the doctrine of Ahimsā was extended to penology for making capital sentence itself a royal crime. On the other hand, the pillar edicts of king Aśoka point to the fact that capital sentence was taken for granted. Pillar Edict IV, for instance, allows a respite of three days to the condemned prisoner during which his friends and relations, or any one else, may take necessary steps for getting the sentence of death annulled. The concluding portion of the edict runs thus :

And my order (reaches) even so far (that) a respite of three days is granted by me to persons lying in prison on whom punishment has been passed, (and) who have been condemned to death. (In this way) either (their) relatives will persuade<sup>2</sup> those (Lajūkas) to (grant) their life, or, if there is none who persuades (them) they bestow gifts or will undergo fasts in order to (attain happiness in) the other (world).

For my desire is this that, even when the term of (respite) has expired, they should attain (happiness) in the other (world).

And various moral practices self-control (and) the distribution of gifts are (thus) promoted among the people.

It would be no exaggeration to say that the mind of the intelligentsia must have been agitated on the propriety or expediency of capital punishment. An interesting evidence of this is to be found, in the Mahābhārata (Chapter CCLVII of the Śāntiparva) in which there is a discussion between King Dyumatsena and his son Prince Satyavān. A number of men having been brought out for execution

<sup>1</sup>See Lecture VI under head 'Arthaśāstra'.

<sup>2</sup>Literally : 'will induce to meditate and consider'. Cf. Kauṭilya : *puṇyaśīlāḥ samānubaddhā vā doṣaṇiṣkrayaṁ (bandhanasthānān) dadyuḥ*. This may refer to expiation or redemption as applied to those who are under restraint (by process of law)—an important principle always kept in view.

at the command of his father, Prince Satyavān gives vent to his thoughts thus : "Sometimes virtue assumes the form of sin and sin assumes the form of virtue. It is not possible that the destruction of individuals can ever be a virtuous act." Thereupon Dyumatsena observes, "If the sparing of those who should be killed be virtuous, if robbers be spared, O Satyavān, all distinction between virtue and vice will disappear." Satyavān rejoins ; "Without destroying the body of the offender, the King should punish him as ordained by the scripture. The King should not act otherwise, neglecting to reflect upon the character of the offence and upon the science of morality. By killing the wrongdoer, the King kills a large number of innocent men. Behold ! By killing a single robber his wife, mother, father and children, all are killed. When injured by wicked persons the King should, therefore, think seriously on the question of punishment. Sometimes a wicked person is seen to imbibe good conduct from a pious person. It is seen that good children spring from wicked persons. The wicked, therefore, should not be exterminated. The extermination of the wicked is not in consonance with eternal law. By punishing them gently, by depriving them of all their riches, by chains and imprisonment, by disfiguring them they may be made to expiate their offences. Their relatives should not be punished by infliction of capital punishment on them."<sup>1</sup>

In the passages above quoted are to be found some of the most telling arguments against capital punishment which in the nineteenth and the twentieth centuries have begun to agitate the legislators and administrators of the West. They are : the inherent unrighteousness of taking life for life, the unrighteousness of punishing innocent people such as children and dependants by taking the life of the bread-winner of the family, the loss to the State of possible good citizens in the prospective children of the condemned ; and the loss

<sup>1</sup> Adharmatām vāti dharmo yātyadharmaśca dharmatām ।

Vadho nāma bhaveddharmo naitadbhavitumarhati ॥

Dyumatsena uvāca :

Atha cedavadho dharmo dharmah ko jātucidbhavet ।

Dasyavaścenna hanyeransatyavansainkaro bhavet ॥

Mamedamiti nāsvaitatpravarteta kalau yuge ।

Lokayātrā na caiva syādatha cedvettha śaṁsanah ॥

Satyavānuvāca

Asamīkṣvaiva karmāni nītiśāstram vathāvidhi ।

Dasyūnnihanti vai rājā bhūvaso vāpyanāgasah ॥

Bhāryā mātā pitā putro hanvante puruṣena te ।

Parēnāpakṛto rājā tasmātsamyakpradhārayet ॥

Asādhuścaiva puruṣo labhate śūlamekadā ।

Sādhoścapi hyasādhubhyaḥ śobhanā jāyate prajā ॥

Na mūlaghātah kartavyo naiśa dharmah sanātanaḥ

Api khalvavadhenaiva prāyascittam vidhīyate ॥

Udvejanena bandhena virūpakaraṇena ca ।

Vadhadaṇḍena te kṛtsvā na purohitasaisasadi ॥

Śāntiparva, Chap. CCLXVII, verses 4-6, 8-13. Vasudeva's Ed.

to the State of an individual who might have reformed and become a useful citizen. It shows at least that the ancient Hindu penalists were keenly alive to this vexed problem of sociology and penal philosophy of the present day. It is interesting to note that opinion on this subject was by no means settled, or uniform. Thus we find in Śūkrāchārya : "One should not kill living beings—this is the truth of Śruti. So the King should carefully avoid capital punishment and restrain by detention, imprisonment and repression".<sup>1</sup> But it appears that it is not difficult to draw from the same source, namely, Śūkranīti and the Śruti, just the opposite conclusion and lay it down as a governing principle : "According to the dictates of Śruti the execution of bad men is real Ahimsā".<sup>2</sup>

"If robbers be spared all distinction between virtue and vice will disappear". This observation of King Dyumatsena's contains within it the modern theory that if offenders be let off crimes will multiply. Apart from the question of capital punishment, Satyavān takes up this general aspect of the penal problem and deals with it in the following verses : "Even the Brāhmana, who puts on a deer-skin and uses the staff and has his head shaved, should be punished. If great men transgress, their punishment should be proportionate to their greatness. As regards those who offend again and again they should not be let off without punishment as on their first offence."<sup>3</sup> They lay down the modern doctrine of individualisation : that punishment should be meted out in larger measure to those who have had the advantage of caste, position or education ; also that the first offender should have gentler treatment as compared to those who have offended again and again.

But there is more in this discourse. Prince Satyavān just touches on the question of penance or expiation in verse 14. "If in the presence of the priest and others they give themselves up to him from desire of protection and swear saying 'O Brāhmaṇa we shall never again commit sin', they should be discharged without any punishment. This is the command of the Creator himself". It may appear naïve to a twentieth century legislator to lay down that an offender should be discharged if he shows true contrition, but there is more in the doctrine of expiation than meets the eye in these two verses. The statement has behind it the whole philosophy of expiation by penance known as *Karma-vipāka* which was one of the accepted methods of rehabilitating the offender. A detailed treatment of it will be found in a later lecture.

<sup>1</sup> Śukranīti, Chap. IV, Ver. 184-86.

<sup>2</sup> Śukranīti Chap. IV, Sec. I, Verse 103.

<sup>3</sup> Mahābhārata, Chap. CCLXVII, Verses 14-16.

## LECTURE VI

### PENAL SCIENCE IN ANCIENT INDIA (CONTINUED)

#### BRĤASPATI SŪTRA

The Brĥaspati Sŭtra consists of concise aphorisms, each of them containing in a highly concentrated form as much knowledge on the subject-matter as can go into it. It, therefore, calls for elucidation at every step.

In the Brĥaspati Sŭtra, penal science (Daṇḍanīti) occupies a pre-eminent place in royal policy (Rāja-dharma). In fact, it is honorably mentioned as the knowledge *par excellence* for the King. In this respect, as well as in some other respects, the standpoint of the Brĥaspati Sŭtra is fundamentally the same as that of the Arthaśāstra of Kauṭilya. Another point of affinity between the two is established by the fact that in both great importance is attached to society, or social sanctions (loka). This is significant, as it indicates a high level of development. Penal science cannot steer clear of the realities of life. It must keep contact with society, and feel its pulse so as never to become alien to its estimate of moral values. Theories of crime and punishment must be brought into harmony with every day facts of life. Not the immediate present only, but the past, the present and future form a continuum, out of which penal science emerges. Penology must drink at the sources of life which are manifold, and of which the past (i.e., history), the present (i.e., the social framework of the day) and the future (i.e., the end, which is always in the future and to which all things tend) are but parts and parcels. This conception occupies a high place in the penal system of the Brĥaspati Sŭtra as well as that of the Arthaśāstra, thus pointing to their mutual connection.<sup>1</sup>

A few of the sŭtras of Brĥaspati will illustrate what has been said above :

*Daṇḍanītireva vidyā*      I. 3.

Penal science is the knowledge *par excellence* (for the King).

<sup>1</sup> As Prof. Thomas observes in the Introduction to his edition of the Brĥaspati Sŭtra, "A connection with the Bārĥaspatyas may be seen in the restriction of royal sciences to one, namely, Daṇḍanīti (Arthaśāstra p. 6) although they add Vārttā (which again is represented in our text by Kṛṣigoraksāvānījyāni II 4 ; cf. Arthaśāstra p. 8, Kṛṣipāśupālye vānījyaṁ ca vārttā). The importance attached to the Lokāyata and Bauddha doctrine also points to the same direction". The page references given in the above extracts are to Pandit Śyama Sastry's edition of Kauṭilya's Arthaśāstra.

In this connection the quotations from a so-called Brĥaspati Sŭtra in Vātsyāyana's Kāmasŭtra deserve special notice.

*Dharmamāpi lokavikruṣṭaṁ na kuryāt* I. 4.

*Karoti cedāśāsyaīnaṁ buddhimadbhiḥ* I. 5.

Even right (dharma) he (the King) should not practise if it runs counter to the estimate of society (loka). Should he do so, the object should first be clearly explained to the people by those who know. Again,

*Janaghoṣe sati kṣudrakarma na kuryāt* I. 95

"Acts of no moment should not be done if there is popular clamour against it." This is based on sound common sense. Law that takes no note of public opinion is here deprecated. Of course, in essential and fundamental matters the law as it stands must be upheld, as an aid to further progress and a check on temporary set-back due to transgression. Not so in unessentials. In the case of the latter, the ruler would at his discretion withhold the application of particular laws, should they run counter to the popular view.

*Nītiḥ kila nadīrātaraṇvat* I. 102

"Penal science is like unto the tree on the banks of the river" (at once drawing its sap from, and assuring the easy flow of, the river and at the same time strengthening the banks, thus acting as a check to transgression). The river in the above aphorism is clearly the stream of human life from which penal science, the tree on its banks, constantly draws and receives moisture. At the same time the tree acts as the cement that binds the embankment—a truth well known to forestry—and thus prevents transgression by the river. The idea underlying the imagery occurs again and again in Sanskrit literature. In fact, the aphorism reminds one of a well known passage in *Abhijñāna-Śakuntalam* of Kālidāsa. Literature and drama often afford striking evidence of the popular appreciation of law. Such evidence being indirect is the more valuable. Thus the passage in Kālidāsa would show how the kingly function was understood in ordinary life. It runs as follows:

*Vyapadeśamāvilayitum kimihase janamimam ca pālayitum |*

*Kūlaṁkāṣeva sindhuḥ prasannamambhastatatarum ca ||*

Unable to recognise Śakuntalā, King Duṣyanta thinks that she having fouled her own nest (the hermitage of Kanva) is trying to make him a party to her transgression and thus bring about his downfall. Thereupon, he protests in the name of social order and expresses his indignation saying: "Wherefore dost thou try to transgress thy limits and to bring about the downfall of this man (meaning himself), like unto the stream that breaks through its banks and thereby (not only) ruffles the easy flow (but) also brings down the (supporting) tree on its banks."

The passage is specially illuminating, having regard to the fact that therein the King describes his kingly position to be like the tree on the banks of the river—only another way of depicting the function of penal science as in Bṛhaspati Sūtra. For, the King and Daṇḍanīti are almost synonymous and are used interchangeably.

The historical background and its importance in Daṇḍanīti is further brought out in other aphorisms in Adhyāya III.

*Itihāsāpurāṇāni mānayet* III. 31

*Tatpākāmsca* III. 32.

Due regard must be paid to history and to ancient chronicles (purāṇas); and to the expositions thereof. The word pāka, it may be mentioned, seems to be a synonym for *pakti* in *jana-pakti*, *loka-pakti*—“teaching the people.”<sup>1</sup>

A further step is taken when the philosophy and scriptures of various sects, whose doctrines greatly vary from one another, are brought within the necessary equipment for a true knowledge of penal science. Verses 33-37 lay down that the Śākta, the Vaikhāṇasa, the Sāṅkhya and the Śaiva literatures are to be studied. “As regards all these let him (the King) perform a due study and also cause to be studied.” This bespeaks a breadth of mind remarkable in that ancient epoch, and lays down a standard of liberal training for the ruler sufficient to inspire him with knowing sympathy for all classes of law-breakers, so that justice may not be blind but guided by insight and foresight.

The view that penal science must not lose contact with society (loka) and that there is constant action and reaction between the two, necessitates an exposition of what ‘society’ means. In order that an act may be regarded as right or wrong, it must conform to, or conflict with the standard set up by a particular society. Call an act moral or legal, what you like, it is not an abstract conception but it is clothed with the vesture of approbation or disapprobation and stamped with the *imprimatur* of the particular society to which you belong. Out of that society, in the country of the Ho’s or the Hottentots, the act may be regarded as quite different. What your penal law regards as heinous may be quite innocuous among the cannibals. Hence in all law one may expect to find a definition of the territorial or geographical limits within which lies the society that holds the measuring rod for determining offence or evil, right or duty, blameworthiness or praiseworthiness. True, such society may expand in course of time and the territorial boundaries too accordingly. Penal science may in

<sup>1</sup> As in Śatapatha Brāhmana XI. 5. 7. 1.

See the observations of Prof. Thomas in his edition of Bārhaspatya Sūtra

the future become international. With the development of facilities for communication between different countries, and the growth of international congresses and conferences, the same penal concepts may find acceptance in more countries than one. Forms of punishment, or of social reaction against crime, may tend to become more and more similar. But the world has not yet arrived at the stage of moral cosmopolitanism wherein the geographical bounds of duty and responsibility have been indefinitely extended till they threaten to disappear altogether. At any rate it could not be so in ancient society.

The Bṛhaspati Sūtra in its third Adhyāya proceeds, on the above principle, to lay down the limits within which uniform standards of right and wrong, capable of governing human action, exist. It defines the geographical limits of Bhārata-Khaṇḍa (India), and observes :

*Tatra sākṣād dharmādharmaṣhalāḥ sidhyanti* III. 73

*Tatra Daṇḍanīti* III. 74

*Pūrvabhāratīyair paṭhitavyā bhaviṣyair vartamānaiḥ ca cāturvarṇi-  
kaiḥ ca* III. 75.

“There have been directly realised the fruits of right and wrong (dharma and adharma). That is the home of Daṇḍanīti. Penal science should be studied (for its proper realisation) with reference to its bearings (on the people of Bhārata-khaṇḍa) in the past, the present, and the future, also with reference to the four orders of society.”

In the fourth adhyāya again one comes across the principle of conforming to intelligent public opinion :

*Aikamatyena daṇḍanīnecreṇa dhīrair mantribhir yo mantrāḥ sa  
uttamaḥ* IV. 34

“That counsel is best which comes of uniformity of opinion and is seen through the eye of penal science and in consultation with dispassionate counsellors.”

The same regard for the local and temporal factor (*loka*) appears in the sixth adhyāya :

*Deśakālayogyam karma nayānayaḥ ca vedayet* (VI. 1.)  
*Viparītaṁ na vedavīryadarpeṇa* (VI. 2.) *Nayo mantribhir nirūpya  
kāryate* (VI. 4.)

“Let him discern action in consonance with place and time, also observance and transgression not contrary to wisdom, individuality or self-esteem. Let him regulate observance after deciding with the help of counsellors.”

Considering the high place accorded to *loka* in penal science it is necessary, to avoid confusion, to distinguish between *loka* and



*laukāyatika*. It has been observed above <sup>1</sup> that Bṛhaspati lays down the necessity for a broad-based knowledge of all social, moral or religious codes, no matter whether they are out of the ordinary, or even heretical, in order that penal science, far from being sectional, may be comprehensive and catholic. The study of Śākta, Vaikhāṇasa, Sāṅkhya, Śaiva and other systems laying down particular codes of conduct should be studied, for they all react on the body politic and hence ultimately on penal science. But this injunction is hedged round with warnings against reactionary principles. These have to be studied in their context in order to understand the object of the attack upon the Kāpālikas, the Ārhatas, the Bauddhas and the Laukāyatikas. The exact place of these orders or sects in society is indicated in words which, without ambiguity, express disfavour and disapprobation. The following aphorisms (II—ver. 1-24) will speak for themselves:—

“Sovereignty belongs to one with resources,—resource of knowledge (*vidyā*), resource of wealth (*artha*), and resource of following (*sahāya*) ; gratification of his own family also and protection of usage ; agriculture, animal husbandry, trade and commerce. By all means it is the *laukāyatika* teaching which is to be followed at the time of acquiring gain ; it is the Kāpālika doctrine (which is to be followed) for the attainment of pleasure, the Ārhatta in regard to right. The *laukāyatika* gain does not endure, it quickly perishes. So the Kāpālika, the Ārhatta and the Bauddha. On these relying he is like the moth and the fire. The fruits are like water in the ear :<sup>2</sup> when one characterised by ignorance (*a-vidyā*) desires in a matter connected with right to effect his human object then he becomes a pretender of the name of *laukāyatika*. When a *cāṇḍāla* is desirous of enjoying good drink, flesh and so forth, then he becomes a pretender calling himself Kāpālika. When, abandoning worship at twilight, sacrifice and so forth, he desires to follow the rule of *Ahiṃsā*, then he becomes a pretending Kṣapaṇaka. When abandoning the rites described in the Veda, and the knowledge prescribed by it, and also Śiva, the Lord of all, Viṣṇu and Śrī, a man declares that all is void then he is a pretender calling himself Bauddha. When he talks vainly about Dharma as a means to an end he is a *laukāyatika*, a seeker after lucre and a thief. He does all for profit—sacrifice, twilight prayer and so forth. To conceal his failing, he reads the Veda (but is) afflicted with desire. He practises sacrifices and so forth. He does it with a view to drinking

<sup>1</sup> See *supra*, *adhyaya* III Verses 33—37.

<sup>2</sup> i.e., a source of pain and discomfort.

wine, with a view to intercourse with women. He says Viṣṇu and the others are wine-drinkers, so the Kāpālīka. The Kṣapanaka speaks of the retention of urine and fæces for performance of dharma, as dharma itself. He speaks of Śiva and so on—so the Kṣapanaka. With a view to abuse others he studies Veda, Śāstra, right and so forth. He abuses all, even Maheśwara, Viṣṇu etc. He even prattles about dharma for the sake of his belly. For the sake of discussion he praises others—that is the Bauddha.”<sup>1</sup>

From the above it will be clear that the Laukāyātika has nothing to do with Lokāyata. The latter stands for the social conscience, while the former belongs to a category of people who represent the reactionary forces of society. It is for this reason that he, along with those others above mentioned, comes in for severe treatment and is mentioned as one of the insidious forces to be shunned and avoided for the sake of *défense sociale* which is the aim and object of penology.

### THE ARTHASĀSTRA

From the poetry and imagery of the Mahābhārata we descend to *terra firma* when we come to the Arthasāstra. The terse aphorisms of Bṛhaspati give place to the reasoned discourse of Kauṭilya on the principles of Penal Science. There is a distinct departure from the unscientific way of viewing sciences as mere parts and parcels of sacred lore. On the old Upaniṣadic basis, Śreyas (good) is distinguished from Preyas (the desirable), and scientific studies are placed on the latter, i.e., utilitarian, basis thus bringing about their secularisation as far as possible. Penal science is freed from the apron strings of religion and rituals. Yet its intimate connection with religion, so far as it enters actual life, is maintained. Tradition old and new, as forming the very texture of society and the solid background for individual and social conduct, is not forgotten. The treatment of penal science is based on the consciousness that customs, beliefs, social approbation and disapprobation, economics and agriculture, literature and philosophy, even astronomy and astrology, all tend to react on the social fabric and thus mould and influence human conduct and, therefore, penology; but that nevertheless they are different from penology itself.<sup>2</sup> This differentiation and integration, analysis and synthesis forms the outstanding characteristics of Kauṭilya's treatment. They proceed *pari passu* in the

<sup>1</sup> Bṛhaspati Sūtra II Ver. 1—28

<sup>2</sup> Cf. *Daśakumaracaritam*.

*Tac ca kila śāstram sarvaśāstrānubandhi sarvameva vāñmayam aviditvā na tatvaṭo' adhigamṣyate*: That science is inter-related with all other sciences. Without knowing all that has been written (in them) it cannot scientifically be comprehended” Kale's Ed. p. 191.

Arthaśāstra in formulating the standpoint and elaborating the exact position and principles of penal science. Indeed, it is difficult to find in any literature of penology a definition and a delineation of its exact place and function, with reference to other departments of knowledge, executed with greater common sense or with stricter regard to accuracy.

The second chapter (adhyāya) opens with an enumeration of the four sciences (vidyās) broadly constituting the different branches of human knowledge on Welfare (Artha). [It will presently be seen that these are but the broad divisions each having under it many subdivisions]. Kauṭilya refers to the Mānava, the Bārhaspatya and the Auśanasa as amongst the schools of polity he has utilised for his treatise.<sup>1</sup> He, therefore, proceeds at the outset to reconcile his own enumeration of four sciences with the three of the Mānavas, two of the Bārhaspatyas and one of the Auśanasas. There is no conflict, he assures us, between him and his predecessors : Ānvīkṣikī, Trayī, Vārttā, Daṇḍanīti ca—these are his four. Now, the Mānavas, he says, have not mentioned Ānvīkṣikī, as it is of a piece with Trayī (the three Vedas— Rik, Yajuh, Sāma). *Trayīviśeṣo hi ānvīkṣikī*, The Bārhaspatyas again omit Trayī. This omission is explained by Kauṭilya saying that for those who are versed in the affairs of life the three Vedas indeed envelop everything—*saṁhvaraṇamātram hi trayī lokayātrāvidah*. Lastly, the Auśanasas speak of Daṇḍanīti as the only science. Kauṭilya explains it saying ‘Verily, in Daṇḍanīti all sciences are rooted’<sup>2</sup>—*tasyāḥ hi sarvavidyārambhaḥ pratibaddhaḥ*.

What then is Ānvīkṣikī and what are the respective provinces of the other broad divisions of knowledge? The following passage explains it :—

*Sāṅkhyam yogo lokāyataṁ cetyānvīkṣikī ; dharmādharmau trayīyām ; arthānarthau vārttāyām ; nayāmayau daṇḍanītyām ; balābale ca etāsām hetubhiraṇvīkṣamānā ānvīkṣikī lokasya upakaroti, vyasane abhyudaye ca buddhimavasthāpayati prajñā-vākya-kriyā-vaiśāradyaṁ ca karoti.*

Ānvīkṣikī has for its ingredients Sāṅkhya (reasoning, from cause to effect) Yoga (discipline), and Lokyāta (social conscience). The triad of Vedas deals with right and wrong ; Economics (vārttā) with wealth and want ; Penal science (Daṇḍanīti) with the guidance of conduct, with observance and breach.” Hence Ānvīkṣikī would apply to all. It is that knowledge which enables one to see things in their relation of cause and effect and to apply them to life. For

<sup>1</sup> See Lect. V.

<sup>2</sup> Cf. Aitareya Upanisad Chap. III, v. 99.

*Majet trayī daṇḍanītau hatāyām*, “the three Vedas founder if penal science is destroyed.”

without examining things in their causal relations and in their practical applications no science can exist or thrive, no undertaking can succeed, no duty can properly be performed. "The examination of the applicability or inapplicability of all these (the four) with due reference to cause and effect is Ānvīkṣikī. It is of service to mankind, in prosperity or adversity it keeps the mind even and makes men proficient in intellect, speech and action". Indeed, it is the light that lighteth all sciences.

• *Pradīpaḥ sarvavidyānām upāyaḥ sarvakarmaṇām*  
*Āśrayaḥ sarvadharmṇaṇaṁ śaśvad ānvīkṣkī matā*

Arthaśāstra I. (ii).

The next adhyāya deals with Trayī, the triad of Vedas—Rik, Sāma and Yajur. It is to be remembered, Kauṭilya adds, that the Atharvaveda is also to be regarded as Veda. So also Itihāsa, such as the Purāṇas, the Mahābhārata. In fact, the last mentioned is often called "the fifth Veda". Further, the Vedas include the branches of knowledge called the Vedāṅgas, namely, Śikṣā (science of pronunciation and euphony), Kalpa (science of rituals), Vyākaraṇa (grammar), Nirukta (Vedic glossary), Chhandas (science of metre, prosody) and Jyotiṣam (astronomy and astrology). The Vedas, it is stated, maintain the four orders—Brāhmaṇa, Kṣatriya, Vaiśya and Śūdra in their respective spheres of duties. These four orders were then, so to speak, the steel-frame of society and the value of all action, good, bad or indifferent, had to be assessed with reference to that social frame-work. It is easy to realise that a comprehensive treatise of those days on royal policy (Rājadharmā), with a dissertation on the scope and province of penal science, no matter how secular its standpoint might be, must needs treat of the caste (Varnaśrama) system. Hence it is that Kauṭilya deals with it so as to be in contact with concrete realities of life.

In the next section Kauṭilya deals with Economics (Vārttā) which treats of agriculture, animal husbandry, trade and commerce—*Kṛṣi pāsupālye bāṇijyam ca vārttā*—It is here shown as to how Vārttā and Daṇḍanīti are related. Then follow a few pregnant sentences which may be taken to define at once the function and the outlook of Penal Science :

*Ānvīkṣikī trayī vārttānām yogakṣemasādhano daṇḍaḥ<sup>1</sup> tasya nītiḥ daṇḍanītiḥ; alabdhalābhārthā, labdhahaparirakṣaṇī rakṣitavivardhanī, vṛddhasya tīrtheṣu pratipādanī ca ; tasyām āyattā lokayātrā ; tasmāt lokayātrārthī nītyam udyatadaṇḍaḥ syāt. Na hi evamvidham vāśopayanam asti bhūtānām yathā daṇḍaḥ iti ācharyāḥ.*

<sup>1</sup> Cf. Kathoponiśad, Valli I. 2.

\* \* \* *Yogakṣemād vṛute*, which is explained as *apṛāptapṛāṇa pṛāpta pariṭālanarūpa Yogakṣemahetoh*.

"The application (of proper methods) and realisation of ānvīkṣiki, trayī and vārttā are the function of Daṇḍa. The science that deals with it is Daṇḍanīti (Penal Science). It helps acquisition of the unacquired, protection (or preservation) of the acquired as also its augmentation, and sees to its use or bestowal in the right manner (on right objects). The affairs of the world depend on it. Hence those who wish to prosper in the world should always exalt (raise high) Daṇḍa. Verily, say the preceptors, there is nothing so well adapted to win man's submission as Daṇḍa". The statement contained in the last sentence does not pass unchallenged. In Kauṭilya's estimation, it calls for qualification. Hence follows his criticism thus :

*Neti Kauṭilyaḥ : tikṣṇa daṇḍo hi bhūtānām udvejanīyaḥ ; mṛdu daṇḍaḥ paribhūyate ; yathārthadaṇḍaḥ pūjyaḥ ; suvijñātaḥ praṇīto hi daṇḍaḥ prajā dharmārthakāmair yojayati ; duṣpraṇītaḥ kāmakrodhābhyām ajñānād vānaprastha parivrajakānapi kopayati kimaṅga punar grhasthān ; apraṇīto hi mātṣyanyāyamudbhāvayati—balīyānabalaṁ hi grasate daṇḍadharābhāve tena guptaḥ prabhavaṭīti.*

In other words, that is not the whole truth, says Kauṭilya. It has to be added that the principles on which Daṇḍa rests are as follows : "Punishment, if too severe, alarms men ; if too mild, it frustrates itself. Punishment, according to deserts should be encouraged. Punishment, properly determined and awarded, make the subjects conform to dharma (right), artha (wealth) and kāma (desire). When improperly awarded due to ignorance, under the influence of lust and anger, it enrages even hermits and (religious) mendicants, not to speak of householders. Punishment unawarded would verily foster the regime of the fish—i.e., in the absence of the upholder of law the strong would swallow up the weak. Protected by the upholder they would prosper."

In conclusion, Kauṭilya thus formulates his position that all sciences are rooted in Daṇḍa :

*Tasmād daṇḍamūlās tisro vidyaḥ*—Hence the three (other) vidyās or categories of knowledge given by him as above have their root in Daṇḍa (punishment). It follows that if Daṇḍanīti (penal science) goes, everything goes.

## MANU

How does Manu view the place of Penology in the scheme of sciences? There are a few points of difference in details between the treatment by Kauṭilya and that by Manu, but they are more apparent than real. The seeming difference arises from the fact that in the days of Sumati Bhārgava there was no longer any need for elaborate analysis, or elucidation, to define the boundaries of

Penal Science. Hence we find Manu practically condensing the whole subject into one verse. In considering the appropriate sources from which knowledge of the different vidyās (sciences) is to be acquired he says:

*Traividyebyhstrayīm vidyām daṇḍanītiṃ ca śāśvatīm  
Ānvīkṣikīṃ cātmavidyām vārttārambhāṃśca lokataḥ* VII. 43

The three Vedas (Trayī) are to be learnt from persons well-versed in them. They as well as the other four Vidyās, namely, the eternal science of Daṇḍanīti, Ānvīkṣikī, Ātmavidyā as also Vārttārambhās (affairs relating to Vārttā or economics)—are to be learnt with due regard to loka (the world *i.e.*, social values). It will be observed that in place of the Arthasāstra classification giving four vidyās, here are mentioned five of which Trayī, Daṇḍanīti, Ānvīkṣikī and Vārttā are common to both classifications. Manu introduces a new one, Ātmavidyā, as a separate category. He further takes out loka, one of the factors mentioned by Kauṭilya as constituting Ānvīkṣikī, and applies it equally to all the five vidyās. It will be remembered that Kauṭilya analysed Ānvīkṣikī as being comprised of three ingredients—Sāṃkhya (reasoning from causes) Yoga (discipline) and lokāyata (social values). Kullukabhatta, Manu's commentator, interprets Ānvīkṣikī as only Tarkavidyā—(the science of reasoning) and means by Ātma-vidyā (which he also calls Brahma-vidyā) what appeared as Yoga in Kauṭilya. The close contact with the actual problems of life, however, is maintained, as in the Arthasāstra, by the injunction that all the vidyās are to be acquired with due regard to loka (the world). Thus, though the route is different, the goal is the same, namely, to plant all scientific knowledge, including penal science, on the bedrock of experience, that is, loka or lokāyata, however one may choose to call it. It is to be observed that Manu assigns to Ātmavidyā equal position with Daṇḍanīti, Ānvīkṣikī, Vārttā and Trayī, and adds that all these have for their common background loka, *i.e.*, social conscience or the consciousness of moral values evolved by society.

It is worth while considering this in some detail with a view to elicit from this couplet the philosophy that lies imbedded therein. This is how the commentator Kulluka interprets Manu's Ātmavidyā, which, it should be noted, is intimately connected with Ānvīkṣikī, and Tarkavidyā :

*Bhūta-pravṛtti-prayuktyupayoginīm Brahmavidyām ca abhyudaya-vyasanayor harṣaviśāda praśamanahetum śikṣeta.*<sup>1</sup>

<sup>1</sup> The last few words of this passage magnifying Ātmavidyā are reminiscent of Kauṭilya's characterisation of Ānvīkṣikī—*lokaśya upakaroti vyasane abhyudaye ca buddhiṃ avasthāpayati prajñāvākya kṛtyāvaiśāradyaṃ ca karoti*. See p. 102 *supra*.

In other words, Ātmavidyā is (that branch of knowledge which supplies) the means adapted (upayoginim) to the attainment (prayukti) of human desire (bhūta-pravṛtti) with the aid of social values (lokataḥ). This little sentence contains within it the whole philosophy of Responsibility as evolved by the Hindu penalists of old. It raises a world of ideas quite different from the orthodox doctrine which goes by that name, and which is more or less rigidly tied to the so-called doctrine of free-will.

What, according to Hindu penalists, is the basis of danḍa or punishment? Where would they fasten responsibility? How would they tell the act, or the actor, for which or for whom, the social reaction called punishment was deemed just and proper? "The problem of responsibility," says Tarde, "is connected with the philosophical search for causes and is but an application of the latter, but a very arduous one, to the study of the facts relative to man living in society." If, indeed, an individual be the primary cause of his guilty act then he must be absolutely responsible for it. This has given rise to the doctrine of free will, which believes in a divine attribute bestowed upon man, whereby he becomes the creator of his own act and thus becomes fully responsible for it. Liberty in this sense is a kind of "ex nihilo" creative power. The idea of punishment is very often deeply tinged by this idea of absolute liberty. What else can a man deserve but to be severely punished for an act, for which he must be deemed to be the primary, perhaps the sole, cause? If, on the other hand, instead of being the sole or the primary cause, the individual, like every other object met with in real life, be only a secondary cause, itself affected and determined by other causal agencies, for the better or for the worse, the responsibility assignable to his act cannot be absolute or unlimited. It would at best be relative and limited. This has given rise to the doctrine of determinism. Opinion has swung like the pendulum from the one extreme to the other. For centuries the libertarians have waged a war against the determinists, unwilling to admit that the quality of human action can under any circumstances be regarded as determined; while for centuries the determinists have paid back by denying that the category of causality can ever be properly applied to human action which is but the resultant of circumstances—"a stitch in the tissue bound about by phenomena and woven by necessity". The controversy pretty nearly brought about an *impasse*. But in course of time the question came to wear a different aspect. Libertarianism has now learnt the lesson that the so-called free will is not absolutely free. Determinism too has learnt the lesson that human action though determined is not absolutely determined.

Hence, there is causality in all human action even though it may not be causality in the old libertarian sense. The study of causal relations, therefore, is not outside the scope of responsibility for human actions. The old Hindu penalists from the commencement had a clear conception of this central idea, and they accordingly assigned to *sāṃkhya*, the discerning of causal relations, a prominent place in the study of penology.

Yoga is a category of knowledge which plays a predominant part in human action, in the concepts of right and wrong. It is difficult to convey the real meaning, underlying the word *yoga*. Ordinarily, the word is understood to mean, training or discipline of the body and the mind with a view to abstract meditation. Indeed, the whole science associated with the name of *Patañjali* is popularly thought to treat of a kind of physical and mental gymnastics. The real meaning, however, is to be culled from the root-word 'yujā' to apply. It refers to *the application of means suitable to the attainment of ends*. When the end is to attain *mokṣa*, or liberation of the soul, one must *apply oneself* to a certain course of discipline of the mind and body, whereby the soul may attain to the state of beatitude in which the distinction between the individual and the universal soul is obliterated. This is *Yoga* on the spiritual plane. But there is *Yoga* on the secular plane as well, and that consists in the application of proper means to the attainment of particular material ends. The nature of the means will depend on the nature of the end. If the end be the acquisition of wealth, the means must be adapted to that end. If the end be to attain knowledge and bring it to perfection, the means must be specially adapted to that end. If the end be simply the gratification of the flesh, the means must be adapted to that end. If, again, the end be the protection of society, or preservation of the social order, the means must be well adapted to that end. Thus, in the actual world in which we live the application of particular means to particular ends constitutes the royal road to success. And this must be done with due regard to the realities of everyday life, the standard of excellence of actions being largely determined by the current estimate of social values.

What is *Kulluka's* exposition of *Manu's* *Ātmavidyā* but an enunciation of the above fundamental principle? In this respect, it has a clear ring of modernity. *Brahmavidyā* (or *Ātmavidyā*) supplies suitable means (*upayoginām*) to the attainment (*prajukti*) of human desires or objects (*bhūta-pravṛtti*). And this *Ātmavidyā* depends on due regard being paid to social values (*loka*). This doctrine has a strange family resemblance with the modern doctrine that identity is the basis of moral responsibility—an identity that



runs through one's individual and social existence made up of ideas, habits, opinions, beliefs, aims and aspirations. When an act or omission conforms to this settled background it is called right, when it goes counter, and does violence to this individuality, it is told off as wrong. A nation may have its own individuality or identity, even as a man has. As for the man, his individuality or identity has a three-fold basis—physiological, psychical and social. As Tarde observes, "there is a teleology running through them all and it is this adaptation of means to ends that forms the basis of right and wrong acts. If consciousness disperses itself or becomes united with the organism, it lowers or raises itself, contracts or enlarges, lets go of itself or fortifies itself, in conformity with its social surroundings".<sup>1</sup> There is little difference between the above doctrine of individual and social teleology and Kulluka's commentary on the category of Ātmaśāstra or Kauṭilya's exposition of Ānvikṣikī. Another significant passage from Tarde will show the striking similarity between the ancient and the modern. He says: "Now let us observe that all our conscious and thought out actions, a thin but continuous current, stretching from the cradle to the grave, are the practical conclusions, formulated and implied, of what we may call a teleological syllogism, whose major premise is a desire, an object which one suggests to oneself, and whose minor premise is a belief, an opinion bearing on the best means to be taken in order to attain this end. I want to eat some bread; now I believe that the best means by which I can satisfy this desire is to labour; therefore, I *ought* to labour. Here we discern the germ of duty; it is not the social duty as yet, it is but the purely individual duty, but we shall soon perceive the analogy between the two, and that the latter is but the underlying principle of the former. However that may be, it follows from the preceding statement that, while the major and minor premises of the syllogism of finality formulated by the individual, that is to say, his objects and his ideas, are the products of social manufacture, it is the same with the duties—be they individual or social—of the individual, conclusions of this usual and universal formula of reasoning".<sup>2</sup>

This conception of right and wrong, that is to say, the view that commendable actions are those that are adapted to the attainment of human ends with special reference to social values, and that punishable acts are those that offend this standard of Ātmaśāstra *cum* loka, does not lower the concept of responsibility or take away from the reality of moral or legal sanction. On the contrary, it

<sup>1</sup> Tarde, *Penal Philosophy*, p. 118.

<sup>2</sup> Tarde, *Penal Philosophy*, p. 100.

may almost be said that the orthodox ideas of virtue and vice, of right and wrong, of worthiness and unworthiness, divorced from the social background and seeking to establish themselves independently of the physiological, psychological and social teleology which forms the solid basis of human actions, lose themselves in abstraction. With *bhūta pravṛtti* for the major premise, and with *upayoginīm Brahmadevyām* for the minor premise the conclusion of *prayukti* that follows leads to the path of duty with a reality of conviction which must be more forcible than that based on abstractions. This, in short, is the fundamental viewpoint of Hindu penology.

### THE KING AND DAṆḌANĪTĪ

I have already observed that in the literature of Hindu penology, *Daṇḍanīti* (penal science) and the King are almost synonymous; and the two are used interchangeably. There is ample evidence of this in *Manu*. Among others the following verses in the seventh chapter will illustrate the proposition that the King is regarded as the personification of *Daṇḍanīti* :

*Arājake hi lokesmin sarvato vidīte bhayāt. |*  
*Rakṣārthamasya sarvasya rājānamasṛjat prabhuḥ<sup>1</sup> ||*  
 VII, 3.

*Tasyārthe sarvabhūtānām gopatāraṁ dharmamātmajam |*  
*Brahmatejomayaṁ daṇḍamasṛjat pūrvamīśvaraḥ ||*  
 VII, 14.

*Tasya sarvāṇi bhūtāni sthūvarāṇi caraṇi ca |*  
*Bhayādbhogāya kalpante svadharmānna calanti ca ||*  
 VII, 15.

*Taṁ deśakālau śaktimca vidyām cāvekṣya tattvataḥ |*  
*Yathārhatas sampraṇayennaresvanyāyavartīṣu ||*  
 VII, 16.

*Sa rāja puruṣo daṇḍaḥ sa netā śāsītā ca saḥ |*  
*Caturṇāmāśramānām ca dharmasya pratibhūssmṛtaḥ ||*  
 VII, 17.

*Daṇḍaḥ śāsti prajāḥ sarva daṇḍa evābhirakṣati |*  
*Daṇḍaḥ sūpteṣu jāgarti daṇḍam dharmam vidurbudhāḥ ||*  
 VII, 18.

*Samīkṣya sa dhṛtaḥ samyak sarvā ranjayati prajāḥ |*  
*Asamīkṣya praṇītaṣtu vināśayati sarvataḥ ||*  
 VII, 19.

<sup>1</sup> *Vālopi nāvamantavyo manuṣya iti bhūmipah.*

*Mahatī devata hyeṣā narakupena tiṣṭhati—VII, 8.*

“Even if he be a boy, he must not be regarded with scant respect, thinking he is a mere man, for, verily, it is the great deity residing in the form of a human being”.

"Without the King the world would be in terror (at the hands of the powerful). Hence the Lord for the protection of all has created him (the King)—Ver. 3. For the protection of all created beings and for his good ( the good of the King) God has created out of the supreme fiery essence his son Daṇḍa which is righteousness.—Ver. 14. It is for fear of this (Daṇḍa) that all created things, mobile and immobile, in the enjoyment of their respective rights do not deviate from their respective duties.—Ver. 15. The King shall ordain punishment to offenders (law-breakers) according to the merits of each case, having carefully examined it with special reference to the place and time (of the offence) and the capacity and knowledge (of the offender).—Ver. 16. Verily, daṇḍa is the King, the puruṣa (or the one that functions), the governor and the regulator. The Ṛṣis regard him as the safeguard of the functions of the four orders.—Ver. 17.

Daṇḍa rules over all the subjects. Daṇḍa is indeed the protector. Daṇḍa keeps awake while all are asleep.<sup>1</sup> The wise know Daṇḍa to be Righteousness—Ver. 18. Daṇḍa administered with discrimination conduces to the happiness of subjects, but used with indiscretion leads to destruction—Ver. 19. The next verse gives an account of the chaos into which everything will plunge if the King does not administer Daṇḍa in the proper way: "If the King fails unremittingly to administer punishment to offenders, the strong will torture the weak like fishes fried on grid-irons."<sup>2</sup>

### INDIVIDUALIZATION

As regards the principle to be followed in the administration of punishment there appear to be general directions given in Manu. The outstanding feature of these directions is that they take into account not only the objective circumstances of the offence but also the subjective limitations of the offender. In this respect the penal science of Hindu India ranks on the same level with the most advanced systems of the present day. Let us take a passage which was quoted above :

*Tam deśakālau śaktim ca vidyām cāvekṣya tattvataḥ. |  
Yathārhatāḥ sampraṇāyēn nareṣvanyāyāvartīṣu. ||*

Manu. VII, 16.

<sup>1</sup> Cf. the English Doctrine of the King's Peace which hovers about the highways and the by-ways, which overshadows all abodes, and all the cardinal points of the compass—Lect. II.

<sup>2</sup> Cf. Sūkrāniti, Chap. IV, Sec. 1, Verses 101—2: "All the methods and means bear fruit through the King's policy of punishment. That is the great stay of virtues". Compare with this the modern dictum of Dean John H. Wigmore of the North Western Law School U.S.A., that the deterrent theory is the "King-pin of the Criminal Law."

"The King shall ordain punishment to law-breakers according to the merits of each case having carefully examined it with special reference to the place and time (of the breach) and the capacity and knowledge (of the law-breakers). To get the full import of the principle laid down in the above passage we have to read it with another in Chapter VIII of Manu, along with the commentator's observations thereon :

*Anubandham pariññāya deśakālau ca tattvataḥ. 1*

*Sārāparādhau cālōkya daṇḍam daṇḍyeṣu pātayet. 11*

VIII, 126

"After considering scientifically (tattvataḥ) causative tendencies or repeated inclinations (in the offender) and the effect of place and time, of capacity and incapacity, according to antecedents and consequents, one should award punishment". This free rendering of the text is based on the commentary of Medhātithi, the learned commentator of Manu, who thus elaborates the meaning of the above verse : "This is the parent verse regarding offences called punishable or not. The dispensation of punishment should be ordained everywhere following this explanation. In the context, 'anubandha' stands for repeated inclination or generating tendency. Whatever (or whoever) induces him to that act, fully knowing that (or him)—whether (he does it) owing to the hunger of his relations, or the company of religious associations, or addiction to wine, gambling, etc., or to the promoting of mistaken ideas, or with his own will guided by others—these are instances of 'anubandha'. 'Deśa' means village forest, wilderness, water, motherland, land of birth, etc. 'Kāla' means night, day, etc.; times of plenty and scarcity; childhood, youth, etc. 'Sāra' means capacity and incapacity, riches and poverty; 'aparādha' may be of eighteen kinds. Having carefully decided all this according to antecedents and consequents, one should so ordain punishment that established order may not fail".<sup>1</sup>

As stated in the last lecture the text of Manusmṛiti as propounded by Sumati Bhargava is of the 2nd century B.C., whereas the commentary is of the 9th century A.D. It is interesting to note in Blackstone (16th century A.D.) the same idea expressed in pretty

<sup>1</sup> Uktānuktadaṇḍyeṣvaparādheṣu mātṛkāslokoḥyam.

Ētadarthānusāraṇena sarvadaṇḍakṛtiḥ kartavya.  
Tatra paṇaḥpunyena pravṛttiranubandhaḥ pravṛttikaraṇam vā. Anubadhyate prayujyate yena tasmin karmaṇi tam pariññāva kimavamātmakutumba-  
kṣuddavasāyena dharma uta saṅgena vā atha madhyadvūtādisaundatavā tathā  
pramādaḍbuddhipūrvam vā parapravyukt-ssvecchayā vetyādiranubandhaḥ.  
Deśo grāmāranyagrahajala janmaprasavabhūmyādiḥ. Kālo naktandivādiḥ  
subhikṣadurbhikṣabālvayauvanādiḥ. Sārahśaktyaśakti ādhyatvadāridrye.  
Aparādhō'stādaśānām pādānāmanyatamaḥ. Ētatsarvaṁ pauryūparyena nirūpya  
tathā daṇḍam pātayet kuryāt yathā sthitiḥ samsārīki na bhraṣyatiti—  
Medhātithi.

nearly the same words : "The age, education and character of the offender ; the repetition (or otherwise) of the offence ; the time, the place, the company wherein it was committed, all these, and a thousand other incidents, may aggravate or extenuate the crime".<sup>1</sup>

The 128th verse points to the supreme duty of the King justly to mete out punishment, and the retribution which would pursue him, should he fail to keep to the standard :

*Adharmadaṇḍaṇaṁ loke yaśoghṇaṁ Kīrtināśanaṁ. ।*

*Asvargyaṁ ca paratrāpi tasmāt tat parivarjayet. ॥*

VIII, 128

"Punishing unjustly in this world ruins reputation and destroys fame. In the next also, it deprives one of heaven and hence it should be avoided".

### SEEMING LACK OF SYSTEM

In Chapter VIII of Manu are to be found a variety of topics all mixed up together. How the King should adjudicate in the law courts, how he may delegate his authority, what should be the composition of the tribunal, when he may not personally adjudicate, what principles must guide the tribunal appointed, what principles must govern the determination of lawsuits, what are the various classes of suits and proceedings—these form the subject-matter of the first portion of the chapter. As it proceeds, the subject ramifies into proceedings for protection of infants, widows and trusts, rules for forfeiture, escheat, compensation and fines ; rules for pleadings, for summoning of witnesses, for qualifying, disqualifying and exempting witnesses, for production and shifting of evidence, for admissibility or otherwise of confessions, for administration of oaths, for trial by ordeal, for punishment of perjury, and so forth. Apart from law like the above which is largely procedural, there is substantive law laid down for various kinds of breaches, such as those arising from transactions of debt, deposit, mortgage, trusts etc., from boundary disputes, from disputes about remuneration of priests (for ceremonies or sacrifices performed), disputes between owners and keepers of cattle, etc. In the same chapter, again, is to be found the law relating to deceit, defamation, abuse, assault, battery murder, manslaughter, other crimes of violence, offences relating to coins, weights and measures, offences against sexual morality and against the integrity of the family etc. Some of these at the present day would give rise to actions on tort as well as to criminal prosecution, whereas the others would only be punishable

<sup>1</sup> Blackstone's commentaries on the Laws of England, Vol. IV, pp. 15-16.

criminally. To the modern penalist, this may seem strange and difficult to account for, specially because there was no dearth of acute thinking or subtle discrimination among the ancient writers when they attacked fundamental questions like the principles of liability, or the exact scope and province of penology. The difficulty may, however, be somewhat obviated when it is remembered that in that early stage of Hindu society the *smṛtikāras* were more directly concerned with the principles of good living as laid down by the *śāstras*. Law (*Vyavahāra*) has no doubt an importance of its own. But in the eyes of the *smṛtikāras* it was after all only one of the factors that made for good living. The code of good living (*ācāra*) itself was of supreme moment, and so was the code of atonement by expiation and penance (*prāyaścitta*). Law (*Vyavahāra*) was good only as a half-way house in righting the wrong done by the law-breaker. The final atonement could only be effected by change of heart, or true contrition in which the body and the soul had both their due share of penance. This was to be sought by *prāyaścitta*. Hence perhaps it did not matter so much at the time as to whether an offence, to be met by punishment or fine, was treated along with a breach that was to be met by compensation or betterment. They were after all equally offences against good living, as enjoined by the *śāstras*.

### SUPREMACY OF THE BRĀHMAṆA

One of the things that strike a moderner as anomalous is the excessive inequality of treatment accorded by the law on the ground of superiority or inferiority of caste. This point is worthy of consideration. Here are a few instances of differential treatment:

In respect of a *Brāhmaṇa*, a death sentence must be commuted to one of shaving the hair of his head; death sentences may be passed on members of all other castes (Chap. VIII, Ver. 379). Let him (King) not kill a *Brāhmaṇa* even if he be found guilty of all the crimes; he must banish him (*Brāhmaṇa*) from the realm unhurt and with all his possessions—Ver. 380. A more heinous sin exists not in this world than killing a *Brāhmaṇa*; let not a King even think of such a project in his mind—Ver. 381. For having sexually visited a woman of any twice-born caste whether unprotected or protected (by her husband), a *Sūdra* shall be punished with the mutilation of his reproductive organ and a confiscation of all his goods and estates in the former case and in the latter case he shall pay the penalty with his life, and all his goods and estates shall be escheated to the sovereign.—Ver. 374. A *Vaiśya*, found guilty of carnally knowing a protected *Brāhmaṇa* woman shall be punished

with imprisonment for one year, after which all his estates will be escheated to the King. A Kṣatriya, found guilty, of the same offence, shall be punished with a fine of one thousand *panas*<sup>1</sup> and his head shall be shaved with urine.—Ver. 375. A Vaiśya and a Kṣatriya found guilty of carnally knowing an unprotected Brāhmaṇa woman shall be respectively liable to pay five hundred and one thousand *panas* (to the King).—Ver. 376. Either of them, found guilty of carnal knowledge of a protected Brāhmaṇa woman shall be punished as a Śūdra guilty of the same offence or burnt in a hay-stack.<sup>2</sup>—Ver. 377. For having forcibly ravished a protected Brāhmaṇa woman, a Brāhmaṇa shall be punished with a fine of one thousand *panas*; for having known such a Brāhmaṇa woman with her knowledge and consent he shall be punished with a fine of five hundred *panas*.<sup>3</sup>—Ver. 378. It is quite clear from the above illustrations that there was an ascending and descending scale of severity of punishments, according as the caste of the offender was inferior or superior. The higher the caste, the lighter the punishment prescribed for it.

As regards the Brāhmaṇa, in particular, this preferential treatment is somewhat intelligible having regard to the times when Manusmṛti was compiled by Sumati Bhārgava. It was the Sunga period of Indian history when the Brāhmaṇa, and not the Kṣatriya, who seemed for the moment to have lost his martial spirit, that saved the country from foreign aggression. Hence, apart from his person being sacrosanct on account of his high birth, it was thought perhaps that society needed for its own security that the Brāhmaṇa should be accorded special protection. But, apart from this circumstance which relates to that period only, there can be no doubt that he enjoyed special immunity on the ground of his exalted position as the spiritual leader of society.

### FORMS OF INDIVIDUALIZATION

An agreeable contrast is presented by provisions relating to fines in the same Chapter which visit the higher and more prosperous classes with punishments of greater severity. Even the King is not excluded from the operation of this principle "For the offences for which an ordinary person would be punished with a fine of one Karṣapaṇa a penalty of one thousand Karṣapaṇa should be inflicted

<sup>1</sup> Eighty rattis of copper is called a panah or karṣa panah.

<sup>2</sup> Note the difference between Verse 377 and Verse 375 as to the penalty prescribed. The commentator Kullūkabhaṭṭa reconciles the apparent disparity by observing that Ver. 377 must refer to the special case of seduction of a virtuous woman for which the drastic punishment is prescribed.

<sup>3</sup> For similar inequalities see Manu, Chap. VIII, Ver. 279—283; VIII, Ver. 136.

on the King if he is found guilty thereof—Ver. 336. For having committed theft, a Śūdra, cognisant of the law, shall be punished with a fine eight times the usual one in value ; a Vaiśya with a fine sixteen times ; a Kṣatriya with a fine thrity-two times ; and a Brāhmaṇa with a fine sixty-four, a hundred or a hundred and twenty-eight times the usual one in value.—Ver. 337-338. A Brāhmaṇa if he wishes to take even his just fees for teaching (a pupil), or for performing a religious sacrifice, from the hand of one whom he knows to be a thief ( and which money he knows to have been obtained by theft) shall be liable to punishment as a thief.—Ver 340.

Punishments may be of three classes. "By the three lawful expedients of Nirodhana (imprisonment), Bandhana (detention) or Vadha, which includes mutilation as well as death. A first offender should be administered warning (Vāgdaṇḍa). A repeater (*i.e.*, one who has committed the same offence for the second time) should be administered a strong remonstrance (dhigdaṇḍa). One who commits the offence for the third time should be punished with a fine, while one who commits the offence even after that should be punished with mutilation (vadhadaṇḍa). If even mutilation does not prove a sufficient deterrent, all these four forms of punishment should be together administered".—Ver. 129-130.

The King is charged with the duty of knowing not only the laws, but also the customs and usages of different tracts of country, of guilds, communities and families and to dispense justice according to them and in conformity with the Vedas. "The King, cognisant of laws and observing the duties of the (four) several orders of society as well as the usages and customs of different localities, of guilds, communities and families (not incompatible with the doctrines of the Vedas) shall discharge his own duties, *i.e.*, enact and enforce laws, recognising the valid authority of those customs and usages".—Ver. 41.

The nemesis that attends the King who does not faithfully extend protection to his subjects by due administration of justice is referred to in several parts of the chapter ; as also the reward that is his if he rules justly and impartially. Here are a few specimens :

"The King receives a sixth part of the religious merit of his subjects whom he in every way protects and a sixth part of their sins if he fails properly to protect them.—Chap. VIII, Ver. 303. Whatever Vedic studies do his subjects do, whatever sacrifices they perform, whatever gifts they make, and whatever prayers they offer to the deity through his properly protecting them, he enjoys a sixth part of the merit thereof.—Ver. 305. By lawfully protecting his subjects, and by punishing those who deserve punishment, the King



acquires the merit of a sacrifice which is performed daily with a dakṣiṇā of a hundred thousand cows.—Ver. 306. The King who without protecting his subjects realises from them a sixth part of the produce of their fields, revenue, duties, royalties and fines, goes to hell.—Ver. 307. The wise have called the King who takes a sixth part of the agricultural produce of his subjects without giving them the safety of life and property, the filth-taker of all".—Ver 308.

## LECTURE VII

### PENAL SCIENCE IN ANCIENT INDIA (CONTINUED)

#### EXPIATION

Chapter XI of Manusmṛti deals with expiation. "For having done improper acts or failed to do the commendable ones, and for having been attached to the objects of the senses, a man stands under the obligation of doing expiatory penance.—Ver. 44. Some wise men assert that expiation is possible only for sins involuntarily committed, while others, on the precedents contained in the Śrutis, hold that expiation should also be made in respect of sins knowingly committed—Ver. 45. A sin unwillingly committed is atoned for by reading the Vedas ; those wilfully committed at the dictates of evil impulses require separate expiatory penances.—Ver. 46. Having incurred the obligation of doing an expiatory penance for a sin accidentally committed in this life, or for one done in his previous existence, a Brāhmaṇa must not associate with other (pure) Brāhmaṇas before he has made the atonement"—Ver. 47. Many are the forms of penance prescribed for different kinds of law-breakers who are classified into heinous offenders (mahāpātakins) and minor offenders (upapātakins). One of two illustrations will suffice to indicate the austerities that were imposed on offenders for such self-purification: "For the purification of the self a Brāhmanicide shall stay for twelve years in the forest, building a hut therein, living on food obtained by begging, and carrying the cranium of a human skeleton as the token (of his fell crime)—Ver. 73. Or, he shall voluntarily make himself the target of arrows shot by archers with unfailing aim ; or he shall thrice cast himself in a burning fire with his head downward, so that death may ensue.—Ver. 74. Or, he shall institute any of the following Vedic sacrifices, namely, the Aśvamedha, the Sarvjit, the Gosava, the Viśvajit, the Trivṛt, or the Agniṣṭut.—Ver. 75. For the expiation of the sin of killing a Brāhmaṇa he, self-controlled and sparing in his diet, shall travel a hundred yojanas (that is 800 miles), muttering any of the Vedas.—Ver. 76. Or, he shall make over all his belongings to a Brāhmaṇa well-versed in the Vedas, or shall give him a well-furnished house, and ample wealth for his living—Ver. 77. Or, living on a vegetable diet, he shall walk along the banks of the river Sarasvatī from its source to its junction with the sea, or

observing moderation in food, he shall thrice recite a Vedic Samhitā each day.”—Ver. 78.

It will be observed that there is a great deal of disparity between the different kinds of penances prescribed. Many other verses could be cited to show similar disparity. It is reasonable to infer that the drastic methods mentioned in verse 74 were meant for Brāhmaṇicides of lower casts, whereas the lighter ones, such as sacrifices, ascetic living, and reading of Vedas applied to Brāhmaṇas only. This is in keeping with the spirit and tenor of Mānava-dharma-śāstra, in which the Brāhmaṇa is all in all. As has been rightly-observed, “the Brāhmaṇa, when the Code of Manu was composed, was the Emperor of India, he was the lord of all, his empire recognised sub-kings, he had smarted under the Mauryan law seeking to establish uniformity and equality before the Criminal Court (daṇḍa-samatā) in contravention of the common law which was based on caste \* \* \* he claims exemption from capital punishment, he argues for a special criminal law for his caste”<sup>1</sup>

### YĀJÑAVALKYA

In Yājñavalkya we find ourselves in a more liberal atmosphere. The excessive partiality to the Brāhmaṇa is greatly moderated, and the Brāhminical privileges considerably cut down. Another important feature is that Yājñavalkya tacitly differentiates between sacerdotal law (dharma) and secular law (vyavahāra), treating of the latter under a separate chapter (adhyāya). The classification of offences remains essentially the same as in Manu, and equal emphasis, if not greater, is placed by Yājñavalkya on expiatory penances as necessary to mental rehabilitation. As regards the classification of offences, we shall wait till we come to the Nibandhas, wherein the relevant texts on all topics taken from the writings of principal law-givers and commentators are carefully collated and considered. But it would be more convenient to deal here with Yājñavalkya’s treatment of the subject of expiation. In Chapter III (Prāyaścittādhyāya) we find the following statement of the operation of the law of karma and of karma-vipāka which literally means the ripening of actions i.e. the good or evil consequences of human action: “The consequences of certain actions are brought about after the death of the doer; of certain actions here (while the doer is alive) and of certain actions both here and hereafter. Here the nature (of actions performed) is the cause (of those results)—Ver. 133. Having suffered the due consequences of their actions,

<sup>1</sup> Introduction to *Manu and Yājñavalkya—A Basic History of Hindu Law—* Tagore Law Lectures—1917—p. XXI.

and then having passed through the existences of lower animals, (the transgressors) are then born as the most degraded of mankind, possessed of defects and plunged in poverty and wretchedness—Ver. 217; afterwards, freed from the effects of transgressions they are born in high families where they enjoy pleasures, accomplished in arts and sciences and possessed of wealth—Ver. 218. By omitting to do what is ordained and by doing what is prohibited and by leaving the senses unrestrained, man incurs his fall—Ver. 219. Therefore, he should here perform penance for the sake of purification. Thereby his conscience (*antarātmā*, inner self) as well as society (*loka*) become satisfied.—Ver. 220. 'Those men who do not perform expiatory acts, who take delight in transgressions and are destitute of repentance go to frightful hells.—Ver. 221.' The succeeding three verses name and describe the hells above referred to.

A whole section—Verses 313-328—is devoted to definition of penances :

Brahmacharyya (celibacy, austerity and self-control), compassion, forgiveness, charity, veracity, uprightness, abstaining from killing (*ahiṃsā*), abstaining from theft, sweetness (of words and temper), controlling the senses—these are denominated *yama* (restraint)—Ver. 313. Ablutions, (practice of) silence, fasts, sacrifices, the study of the Vedas, controlling the passions, serving the religious preceptor, purity, abstaining from anger and intemperance—these are termed *Niyamas* (observances).—Ver. 314. When a man lives on cow's urine and dung, milk, curd, ghee (clarified butter), and water with Kuśa grass steeped in it, and the next day observes a fast, he is said to practise the penance termed *Sāntapana*—Ver. 315. When a man performs a *Sāntapana* for six days, subsisting each day on one of the aforesaid articles, and fasting on the seventh day, he is said to practise a *Mahāsāntapana*—Ver. 316. A *Parṇa Kṛcchra* (leaf-penance) is said to consist in drinking the decoction of the following in their order, namely, the leaves of *palāśa*, *udumbara*, lotus, *vilva*, and kuśa grass. A *Tapta Kṛcchra* (hot penance) is said to consist in drinking every day one of these things, in their order, namely, hot milk, hot ghee, hot water, and fasting one night.—Ver. 318. A *Pāda Kṛcchra* (quarter penance) is said to consist either in eating once a day or once in the evening, or (living) without begging or fasting—Ver. 319. This quarter penance in any manner, repeated thrice, is said to constitute a *Prājāpatya* penance. An *Ati Kṛcchra* is this *Prājāpatya* penance performed while living on just one handful of food—Ver. 320. A *Kṛcchātikṛcchra* penance is said to consist in subsisting on milk for twenty-one days. A *Parāka* is said to consist in fasting for twelve days—Ver. 321. A *Saumya-kṛcchra* is said to

consist in eating every day one of these things in their order, viz., oil-cake, the water of boiled rice, buttermilk, water and barley-meal ; and in (afterwards) fasting for one night—Ver. 322. A *Tulā puruṣa* penance is to be known to consist in eating the abovementioned articles each for three nights in their order, and extends over fifteen days.—Ver. 323. That man is said to be practising a *Chandrāyana*, who measures his morsel of food according to the size of a peacock's egg, increasing the number of morsels by one each day during the bright fortnight and similarly decreasing them by one each day during the dark fortnight—Ver. 324. Eating anyhow (not more than) two hundred and forty morsels of food in one month is another form of practising *chandrāyana*—Ver. 325. When a man has been practising a *kṛcchra* as well as a *chandrāyana*, he should regularly bathe thrice a day, mutter sacred hymns and consecrate his morsels with the *Gāyatrī*—Ver. 326. In the case of sins for which special mode of expiation is not laid down, purification is attainable by means of *chandrāyana*. He who practises it for righteousness' sake lives (after death) in the same regions as the moon.—Ver. 327''.

Another set of verses (302-311) deals with the penances to be performed by a person whose transgression is not known (*anabhikhyāta doṣa*). These are obviously beyond the province of ordinary law. Nevertheless, there remains the need for purification. Hence the comprehensive conception that every transgression calls for a measure which varies according to circumstances : If disclosed or detected, the penal law of the land deals with it according to the principles laid down. If undisclosed and undetected, it eludes the law, but it leaves an indelible scar on the character or individuality of the guilty man who should, therefore, seek the assistance of his guru or religious preceptor, and purify himself by proper expiation. If he dies before purifying himself, Death (*Yama*) takes him up and effects the purification by opening the door to re-births according to the law of *Karma*. Thus there are three agencies, so to speak, for righting wrongs : the King (or the law of the land), the *Guru* and *Yama*. This conception occurs again and again. It is significant that in the expiatory ceremonies above described one does not come across those drastic provisions amounting to self-immolation prescribed in *Manu*. The penances required to be performed are believed to be calculated to help close concentration of the mind and the body and to promote true contrition. The part that expiation plays in the Hindu penal system for rehabilitating the mind of the offender will appear more clearly when we consider its practical application by the authors of the Digests, the *Nibandha-kāraṣ* or Jurisprudentes of Hindu Law.

## DAṆḌAVIVEKA

The Daṇḍaviveka of Vardhamāna Upādhyāya is a store-house of learning on penal science. As usual with Nibandhas, it draws its materials from existing sources ; but Vardhamāna brings to bear upon the collated texts an analytical mind and a synthetic grasp which may well serve as models. The author flourished in Mithilā in the first half of the sixteenth century.<sup>1</sup> In his work he makes numerous quotations from the Smṛtis of Manu, Yājñavalkya, Vaśiṣṭha, Nārada, Vyāsa, Kātyāyana, Viṣṇu and others, from the commentaries of Manusmṛti by Kullūka Bhaṭṭa, Govindarāja, Medhātithi and Nārāyaṇa Sarvajña, from the Mitākṣarā of Viññāneśwara, from the Purāṇas, as also from the various Nibandhas, viz., Kalpataru, Kāmadhenu, Vivādaratnākara, Vivādachintāmaṇi and from the works of Bhavadeva, Halāyudha and Lakṣmīdhara. The quotations from the Vivādaratnākara are copious for the obvious reason that the author of the latter, and of the Daṇḍaviveka both belonged to Mithilā. But Vardhamāna makes almost exhaustive use of all the other sources on all essential points. His work may, therefore, be taken as a complete hand-book on Hindu penal science as it was in the sixteenth century.

## SUICIDE : EXPIATION : SELF-DEFENCE

While we are on the topic of expiation it would be convenient to consider how it has been elaborated in the Daṇḍaviveka. Vardhamāna deals with it in connection with the right of private defence. He quotes Manu's dictum which lays down : "A preceptor, a child, an old man or a Brāhmaṇa versed in the Śrutis, when charging as an assailant, may be done to death, irrespective of his status. There is no fault that attaches to killing an assailant". He then refers to the commentary of Nārāyaṇa who opines that, having regard to the kind of persons mentioned in the above verse, Manu could not possibly have meant to extend the right of private defence as against them even as far as to cause their death but only up to causing injuries or mutilating their bodies in self-defence. This hesitation on the part of Nārāyaṇa to extend the right of private defence even to the point of killing the assailant, if need be, when the assailant happens to be a preceptor or a Brāhmaṇa, is due to the traditional regard for their persons. But Vardhamāna observes that where the meaning of the text is clear on the face of it no inner meaning, different from it, can validly be inferred. Even the killing

<sup>1</sup> See introduction by Mahāmahopadhyāya Kamala Kṛṣṇa Smṛtīrtha to his edition of *Daṇḍaviveka*—Gaekwad's Oriental Series, Vol. LII.

of a Brāhmaṇa cannot be wrongful when he comes as an assailant. Nevertheless, any act of killing must cause a stain on one's character and it calls for expiation. In coming to this conclusion he quotes Angiras: "The King, the preceptor and Yama (Death) are all factors in bringing about purification—the King by means of punishment, the preceptor by means of expiation, and Yama (Death) by means of re-births".<sup>1</sup> Here is contained within a short compass the whole Hindu doctrine of moral rehabilitation. No doubt it is inextricably woven into the fabric of the Karma doctrine which not only punishes the wrong-doer in this life but in the life after death, through re-births. The chastening that a man may have to go through after committing an offence is threefold: (1) punishment meted out by the King or the law of the land (2) punishment meted out by the inexorable law of Karma, in this life and (3) in the life after death. Thus the punishment awarded by the law of the land is only one of the three well-known instruments of purification.

Elsewhere, Vardhamāna again discusses this topic in connection with the right of self-defence and the iniquity of suicide. The fundamental principle underlying both, says he, is the duty of self-preservation—*ātmānam gopāyita*. Hence while it is an offence to bring about one's death by wilful starvation, by taking poison, and so forth, it is equally an offence not to defend oneself against aggression that may lead to one's destruction. The problem becomes hard of solution when the assailant happens to be a person commanding reverence as in the case of Bhīṣma in the Kuru-Pāṇḍava war. Arjuna felt a natural repulsion from fighting his kith and kin including those whom he held in the highest reverence. Even Lord Kṛṣṇa, says Vardhamāna, found it difficult to give any cogent reasons wherewith Arjuna could be made to overcome his just repugnance. The only way that Kṛṣṇa could devise was to resort to subtle metaphysical arguments to the effect that, after all, death was only the separation of the soul from its earthly tenement; and to show Arjuna by supernatural means that all beings found their abode in Him for all time. Vardhamāna concludes by saying that when all is said and done, the fact remains that by killing a human being, be he an assailant or not, there is an inevitable stain on one's individuality which calls for expiation.

The moral he draws is as follows:—

*Prakṣālanād hi pañkasya dūrādaṣparśanam varam.*

It is better not to have contact with mire than to have to wash it off (after contact). Put then he adds that this principle of 'preven-

<sup>1</sup> *Daṇḍaviveka* pp. 9-11—Gaekwad's Oriental Series, Vol. LII.

tion is better than cure' may come into direct conflict with the principle 'Thou shalt defend thyself'. To carry out the latter principle one must needs attack and vanquish an assailant. How is one to reconcile these two conflicting principles? Further, it is not only self-preservation in the individual sense, it must be taken also in its collective sense. *Sarvathā ātmānam gopayet* (By all means protect yourself) is to be taken in its larger sense to mean the defence of society *Ātmarakṣanavat prajānām rakṣaṇam vihitam*. Also others who claim your protection—*evam śaraṇāgatānām*. Hence on the principle of protection of one-self and of other selves it is imperatively necessary even to kill a Brāhmaṇa when the proper occasion arises. He proceeds to solve the riddle by resorting to an analogy: 'Thou shalt kill no sentient being' is the injunction of the Śruti. But, again, the Śruti itself lays down that for the purpose of sacrifice an animal must be offered. The antinomy is thus solved: where it is a question of sacrifice, a sentient being may justifiably be killed. Similarly, in the case of self-defence the assailant killed is to be regarded as a sacrifice at the altar of safety, i.e., safety either of the individual or of the collective body.<sup>1</sup>

On other essential questions Vardhamāna devotes separate chapters and collects therein all the important texts from the Śrūtis, the Smṛtis and from the various commentaries for critical and synthetic treatment. It is beyond the scope of these lectures to deal with details. A few of the fundamental questions dealt with by him must engage our attention.

### CLASSIFICATION OF OFFENCES

Under the caption *Danḍanimittāni*, objects of punishment, Vardhamāna deals with the different offences or transgressions that call for the defensive or corrective reaction named danḍa (punishment). Quoting a text of Nārada, he shows that the object of punishment falls into six broad divisions:

*Manuṣyamāraṇam steyam paradārābhimarṣaṇam |*

*Dve pārūṣye prakīrṇam ca danḍasthānāni śadviduḥ ||*

which being translated means, "homicide, theft, violating the chastity of another's wife, two kinds of violence and miscellaneous—these are the six subjects of punishment".

### TORT AND CRIME

Proceeding on this six-fold classification Vardhamāna makes the following observations: Civil disputes always originate from

<sup>1</sup> *Ibid.*, pp. 242-243.



greed or ignorance, and so it comes to pass that either the plaintiff or the defendant is guilty of false assertion of right, or dishonest concealment of facts. Thus some sort of punishment has to be awarded on the guilty party in civil suits. But the subject matter of Daṇḍaviveka has no concern with punishment of such offences as follow *incidentally* from these civil disputes. It concerns the suppression of offences which are reported to the King by spies, and which are brought before tribunals by the officers of the King, as distinguished from those wrongs which are tried on a private complaint. For example a debt, and its non-repayment (*ṛṇādānādayaḥ*) is from one point of view an offence. Nevertheless, its essence is a civil transaction, and not a crime, although punishment may be inflicted in such a case on the guilty party for wanton denial of liability. Further, in homicides, and other cases of crimes the offender is called up before a Court of Justice for the express purpose of infliction of punishment after proper trial ; whereas in an action on debt and the like, the parties are primarily summoned not for the purpose of punishment, but for ascertainment of the truth or falsity of the transaction, which is essentially civil in nature. If a penalty is imposed, it is only incidental. The predominant feature of a crime is its quality of causing alarm to people (*lokodvejakatvam*).<sup>1</sup>

The above analysis demonstrates that the Hindu penalist clearly apprehended the distinction between civil wrong (torts, whether flowing out of contract or not) and crime. Singularly enough, the quality that characterises crimes and distinguishes them from wrongs of other description, namely, of causing alarm to people in general is exactly what is conveyed in Western phraseology by the terms *formidability*, *periculosity*, or, to use the Italian expression, *la temibilitè*.

There is a marked resemblance between the classification of offences in Hindu penology and that of Garofalo. It will be remembered that Garofalo classified offenders into (1) murderers (criminals deficient in pity), (2) thieves (criminals deficient in probity), (3) violent criminals, (4) lascivious criminals, or 'cynics' in the French sense of the word. The classification given in Daṇḍaviveka is exactly the same, with the exception of the miscellaneous class which consists of offences that may not be placed under any one of the above mentioned heads. *Na dṛṣṭam yacca pūrveṣu sarvaṃ tat syāt prakīrṇakam* : "That which is not found in any of the above mentioned is prakīrṇakam."<sup>2</sup> The two kinds of violence (*dve pāruṣye*)

<sup>1</sup> Daṇḍaviveka p. 32.

<sup>2</sup> Nārada—See Daṇḍaviveka, pp 35.

means violence in words of abuse, or violence with weapons, or other afflictive instruments. These two together obviously come under the third head of Garofalo's classification.

The chapter headed *Manuṣyamāraṇaḍaṇḍa*<sup>1</sup> deals with the different kinds of punishment prescribed for murder of a Brāhmaṇa by a member of the three lower castes, and *vice versa*, of a Kṣatriya or a Vaiśya by a Sūdra or *vice versa*, of the circumstances under which *manuṣyamāraṇa* may cease to be punishable for murder, such as in self-defence etc., or as being a rash act not amounting to murder. An outstanding feature is the liability for killing not only men but certain animals, such as a duck, a cock, a peacock, a goose, a frog, a wagtail, a mongoose etc. The author also goes into the question of proof of murder. He observes that murder is usually committed in secrecy and it is difficult to trace and detect the culprit, not to speak of catching him redhanded. Hence there are definite ways and means laid down for detection, which he quotes and comments on. When several persons participate in the act of killing, he who deals the fatal blow (the proximate cause of the murder) is to be treated as the murderer and punished as prescribed. The others are to be punished as accessories of different kinds according to circumstances such as *ārambhakṛt* (he that commences or sets the ball rolling), *sahāya* (he that aids), *āśraya* (he that harbours), *doṣabhāk* (participator), *mārgānudeśaka* (he that points the way), *śastradātā* (he that hands the weapon), *yuddhopadeśaka* (he that advises or orders the fight), and *anumodaka* (he that supports).

The class *paradārābhimarṣaṇa* is most comprehensive. All manner of sexual offences and all varieties of lascivious criminals are brought within the scope of the term, namely, seducing of married or unmarried women, kidnapping, rape, adultery, incestuous intercourse, unnatural offences, indelicate behaviour with women whether chaste or unchaste.

*Steṇa* comprehends a large variety of dishonest dealings. Apart from theft proper, it includes cheating of customers by grocers and dealers by means of false weights and measures, manufacture of imitation articles; quackery of various sorts, gambling, bogus astrology; extortion of money by false personation, chanting of false incantations; burglary and picking pocket. Theft is defined as the unlawful taking of another's property (*steṇam nāma anauyāyikam parasva grahaṇam*). It is differentiated from robbery in that the latter consists in depriving other men of their property not surreptitiously

<sup>1</sup> *Daṇḍavivēka*, pp. 70-79.

but by the use of force. Thus stealers are of three kinds : robbers (*sāhasakṛt*), cheats (*prakāśataskara*), thieves (*aprakāśa taskara*). The punishments of all three kinds of stealers are determined on the same principles and on the same lines i.e., by re-imbursement of the deprived party, by proclamation of the guilt of the offender and the infliction of the proper penalty, pecuniary or otherwise, according to the facts and circumstances of each case. As usual with other subjects, the texts from the Śrutis, Smṛtis, tikās (commentaries) and other nibandhas (digests) are quoted as authorities for the purpose of establishing Vardhamānas propositions.

Pāruṣya is not mere rudeness of speech. It includes assaults and other offences of a like nature. Rudeness of speech may be of three classes : cruel (*niṣṭhura*), obscene (*aślīla*) and severe (*tīvra*). Thus various types of slander are brought within this class' of offences. Assault may be committed with hands, stones, cudgel, clay, ashes, dust as well as weapons, ordinary and lethal.

In this connection it is necessary to deal with Sāhasa. This is an incident that may attach to any one of the different kinds of offences dealt with above. It has the quality of aggravating the offence.

*Sahasā kriyate karma yat kimcidbaladarpitaiḥ |*  
*Tatsāhasamiti proktaṁ saho balamihocyate<sup>1</sup> ||*

Nārada

Anything done with violence (which proceeds from the pride of power) must aggravate the offence. Hence Sāhasa according to Nārada falls into five classes, as it may attach to any one of the five classes of wrongs :

*Manuṣya māraṇaṁ steyam paradārābhimarṣaṇam |*  
*Pāruṣyamubhayamcaiva sāhasaṁ panchadha<sup>2</sup> smṛtaṁ ||*

## CLASSIFICATION OF PUNISHMENTS

The chapter headed Daṇḍabhedah deals with the usual four-fold classification based on the text of Bṛhaspati : *Vāg-daṇḍa*, *Dhig-daṇḍa*, *Dhana-daṇḍa* and *Vadha-daṇḍa*.

*Vāg dhig dhanam vadhaś caiva caturdhā kathito damaḥ |*  
*Purūṣaṁ vibhavaṁ doṣaṁ jñātvā taṁ parikalpayet ||*

Bṛhaspati

“Punishment is four-fold, namely, admonition, reproof, fine and corporal. It should be meted out after considering the offender, his pecuniary condition, and the crime committed by him”.

<sup>1</sup> Chapter on Sāhasa, *Daṇḍavivēka*, p. 293.

<sup>2</sup> *Ibid* p. 293. It is to be noted that the sixth class *Prakṛtyaka* has been omitted.

The first *Vāg-daṇḍa* may be taken to mean punishing with words i.e., giving a solemn warning such as 'Thou hast acted most improperly'. The second, *Dhig-daṇḍa*, means punishing with strong censure such as 'Shame on thee, thou miscreant'; it differs from the first in intensity, not in kind. The third, *Dhana-daṇḍa*, means punishing with fine which may be of two kinds, fixed and fluctuating. In certain cases the fixed fine may easily be imposed. Certain other cases do not admit of such easy handling. Allowance must be made in the latter class of cases for some elasticity in view of repeated inclinations to offence and other circumstances, such as violence attending it. When the offence is accompanied by violence the punishment must be graded according to circumstances, to fit *prathama sāhasa* (violence of the first order), *madhyama sāhasa* (violence of the second order), and *uttama sāhasa* (violence of the last or extreme kind).

*Vadha-daṇḍa* requires detailed treatment, *Vadha* may be of three kinds *pīḍana*, *aṅgaccheda* and *pramāḥaṇa*. *Pīḍana* (afflicting) is sub-divided into four modes: (i) *tāḍana* such as whipping or flogging, (ii) *avarodhana* or restraint of liberty by means of imprisonment, (iii) *bandhana*, restraint of liberty by chaining, fetters and the like, without actual imprisonment, and (iv) *vidambana* i.e., exposing to ridicule and humiliation such as by shaving the head of the offender, making him ride on an ass, branding his person with a mark denoting his offence, proclaiming his offence with beat of drum, making him patrol the city, etc.<sup>1</sup>

*Aṅgaccheda*, mutilation, may be of different limbs and organs of the body. *Manu* mentions ten kinds of mutilation. *Bṛhaspati* prescribes fourteen,<sup>2</sup> referring to fourteen parts of the body which may be mutilated, namely, hand, leg, organ of generation, eye, tongue, ear, nose, half-tongue, half-leg, thumb and the index finger taken together, forehead, upper lip, rectum and waist.

*Pramāḥaṇa* means capital punishment. It may be of the pure and the mixed variety i.e., in the latter case mutilation or some other form of punishment may be combined with the death sentence. The pure variety again is of two kinds ordinary (*avicitram*) and extraordinary (*vicitram*). The ordinary form of execution is by means of ordinary weapons such as sword and the like; the extraordinary is by means of impaling, or other awe-inspiring methods.

It is noteworthy that according to *Bṛhaspati* *Vāg-daṇḍa*, and *dhig-daṇḍa*, were within the jurisdiction of *Vipras* or *Prādvivākas*, where-

<sup>1</sup> *Daṇḍadivyeśa*, Gaekwad's Oriental Series, Vol. LII, p. 20.

<sup>2</sup> *Ibid*, p. 21.

as *artha-daṇḍa* and *Vadha-daṇḍa* were within the sole jurisdiction of of the King himself.<sup>1</sup>

### INDIVIDUALIZATION OF PUNISHMENT

The chapter headed *Daṇḍanimitteṣu Daṇḍabhedavyavasthā* deals copiously with the interesting subject of individualization, and will well repay perusal by the modern and the most up-to-date penalist. Punishment is to be awarded, and its intensity or severity determined, with reference to various facts and circumstances: the caste and social status of the offender, his knowledge and education, his pecuniary and other circumstances, in fact all that go to make up his individuality. Whether it is one of a series of offences must be duly considered before the scale of punishment is decided upon. The essence of *Daṇḍa* (punishment) is its quality of making the offender desist from again committing the offence (*punaḥpravṛtlinivartana-sāmarthyam*). It must, therefore, be administered so as to achieve this object. The same punishment reacts differently on different individuals. Hence the punishment must be varied, graded or modulated with special reference not to the offence only, but to the individuality of the offender. In some cases, it may have to be less than the punishment prescribed for the offence (*Daṇḍāpakarṣa*), in other cases the same as the one prescribed (*Daṇḍasāmya*) and in still another class of cases more than the prescribed punishment (*Daṇḍotkarṣa*). To take only one of the various causes of variation of punishment, by way of illustration, in the case of a first offender, it is said, the prescribed punishment *ceteris paribus* should not be administered. It should only be awarded if there are grounds for thinking that it is calculated to bring about in the offender a repulsion from that offence. On the other hand, if it be found that the prescribed punishment is not calculated to deter him from wrongdoing the punishment should be made severer. The fact that it is not Vardhamāna's own doctrine but that it is sponsored by ancient authorities is shown by quoting Kātyāyana, Gautama, Halāyudha, Bṛhaspati, Rātnākara. Vyāsa, Sankha-likhita, Nārada and so forth.

The chapter opens with the text:

*Jāṭirāvṛṇyam paṛimāṇaṁ viniyogaḥ paṛigrahaḥ*

*Vayah śaktirguṇo deśaḥ kālo doṣaśca hetavaḥ*

"The tribe or caste (of the accused) the thing, the quantity, appliance, appropriation, the age, the means (of the accused), the place, the time, the offence" all have to be considered for determination of the punish-

<sup>1</sup> *Daṇḍaviveka*, p. 12.

ment. This is only another expression of the principle laid down in Manu and annotated upon by Medhātithi.<sup>1</sup> As regards the caste, Vardhamāna, quoting Viṣṇu, observes that it is laid down that a Śūdra is to get eight times the prescribed punishment, a Vaiśya sixteen times, a Kṣatriya thirty-two times and a Brāhmaṇa sixty-four times. This gradation is based on the principle that the man of culture, social status, and means must pay a heavier penalty for the offence than his inferiors. Why then should the Śūdra be called upon to pay eight times the prescribed fine? Vardhamāna explains that Viṣṇu's dictum must refer to the cultured Śūdra. Even as regards the Brāhmaṇa he must not always be treated as superior and visited with the higher penalty, irrespective of his actual mental equipment. For, he observes, a Brāhmaṇa may be *nirguṇa* (without virtue), *guṇavān* (possessed of virtue) or *ali-guṇavān* (possessed of great virtue). Again, not content with this, he proceeds to add that *guṇa* here does not necessarily mean virtue—it means *jñāna* (knowledge, intelligence) so that it is intellectual equipment which is the primary consideration. He concludes that, ordinarily, the rule is correct, namely, that the Śūdra is liable to *apakarṣa* (lesser than the prescribed) punishment, for the Brāhmaṇa is supposed to commit the act knowingly and, therefore, the offence is greater, whereas the Śūdra often suffers from ignorance. In truth *jāti* (caste) depends on the state of knowledge of the offender. *Ninditaṁ jñānataḥ tatkaraṇam aparādhagauravamāpādayati, jñānamca hīnasya kadāchid-avaluṇyate' pi natūttamasyeti tasya tāratamyc jātiruṇpayujyate.*<sup>2</sup>

The King, the preceptor, the officiating priest, the brahmacharin, the child, the aged and infirm, the intoxicated, the insane and the victim of fell diseases, is entitled to special immunity; also the person goaded by sudden provocation. In all these cases, however, there is no immunity from expiation. Then, again, there are special cases of petty transgression which enjoy special immunity such as a Brāhmaṇa entering a householder's premises for asking alms, or taking fuel, flower and kuśa grass from others' premises, or speaking to others' wives.

Apart from the special rule of immunity by reason of the circumstances mentioned above, the general rule of individualization is thus stated:

*Aparādheṣu yo yasya daṇḍo vihitaḥ sa prathame ca na kartavyaḥ kimtu yadā tasmin daṇḍe prayujyamāne daṇḍanīyasyāparādha-kriyāyām saithilyam vaimukhyamavagataṁ bhuvati tadā prañetavyaḥ. Ye tu vihita-daṇḍakarane'pi pāpādupaśāntā na bhavanti te rājñā*

<sup>1</sup> See Lecture VI.—p.

<sup>2</sup> *Daṇḍavivēka*, p. 37.

*pāpānapohatā yena yena puṇaḥ pāpakriyāyām na pravartante tam tameva daṇḍam teṣām prayunjīte .*

Finally, Vardhamāna lays down the crucial test of the efficacy of punishment thus :

Tadevam yasmin karmaṇi śṅga-grāhikayā yo daṇḍo vihitah, tam dattva'pi yastasminneva pravartate tasya tadadhiko daṇḍah. Yadi tu vihitasya daṇḍasya puṇaḥpravṛttinivartanāsāmarthyam danda-syocchṛkkhalatvādina prathamamevāvagamyate tadṛ yāvātā tanni-vṛttis sambhāvyate tāvān daṇḍaḥ prathamameva praṇetavya iti sthitam.

Yadi tu prathame'parādhe yathāvihito dandaḥ punastajjātiye patite yāvāta damanam tāvān daṇḍa iti matan. Tadā yasya prathama evāparādhe vihitadaṇḍadānāsāmarthyamtato'lpī yasaiva damanam taṭṭha kā gatiḥ? Karmaṇā vihitadaṇḍapūraṇamiti cet kastarhi nirdhanaḥ sarveśām karmasambhavāt.<sup>1</sup>

"Should the administration of the prescribed punishment under each head of offence be not calculated to deter him from repeating it, a heavier punishment would be proper. Since the prescribed punishment by reason of its inability to deter him would fail of its purpose, such measure of punishment as would deter him is the proper measure in the first instance.

"If, however, on the first offence the prescribed punishment be awarded and the offender repeats it notwithstanding, then such punishment as will deter is the right one. In the case of one who is not fit to bear the prescribed punishment on the first offence, there is no alternative but to give him a reduced sentence. Where the prescribed penalty is to be made good by work, no question of poverty can arise, for work may be exacted from all".

Individualization thus may be said to have been brought to a high pitch in ancient Hindu penology. In some cases it is driven to a point which baffles modern comprehension. Yet it must be admitted that it is supported by the most finely balanced argument. A pious Brāhmaṇa, for instance, has committed an offence which is serious enough to call for *aṅgaccheda*, mutilation, as the right punishment. Save for the offence he has committed, his life is well-conducted in conformity with the rules of the śāstras. The punishment has to be adapted to the individuality of the pious and devout Brāhmaṇa. What kind of *aṅgaccheda* will be proper in his case? What will constitute the most effective and deterrent mutilation for him? Cutting him off from his ordinary pious avocations, such as reading of the Vedas, performance of sacrifices etc., amounts to cutting off a limb of his body, mutilating his

<sup>1</sup> *Daṇḍaviveka*, p. 51.

individuality, doing violence to his personality. That is the worst *aṅgaccheda* which can happen to him. *Sa eva sadācārasya damo yat svadharmaviyojanam nāma. Vikhyāpyastena ruṣeṇa loke prakāśaniyaḥ. Aṅgacchedī parasyā'ṅgacchettā viyojyaḥ svadharṁ svadharman kartum svātantramasya bandhanenāpaharet.*

It may not always be possible for us to visualise the exact ethical, social and religious atmosphere which made such individualization as the above possible. But it is by no means difficult to appreciate that it is based on strict scientific principles. There is no tinge anywhere of the theory of retribution or vengeance in the Hindu penal system. So far as some of the forms of punishment go, such as branding, mutilating, impaling etc., they are similar to those found in all ancient systems and appear crude and harsh to modern sensibility. One is almost inclined to think at the first blush that they are out of keeping with the otherwise high standard of penal science in ancient India. But we must remember that such so-called barbarous punishments were most common all over the civilised world as late as just a hundred years ago. 'Painless' punishments such as the electric chair, the guillotine and hanging took long to make their appearance in the world. It is not so much the actual forms of punishment as the principles on which they were administered that concern science.

There can be no doubt that the machinery in ancient India for regulating individualization was elaborate and carefully thought out. Without such a system individualization of the kind demanded by the texts would have been impossible of achievement. We get only a glimpse here and there of ancient social conditions in the *Rājadharmā* and *Anuśāsana* of the *Mahabharatan* age.



## LECTURE VIII

### PROGRESSIVE LEGISLATIVE REALIZATION OF MEASURES OF SAFETY.

We have found that the classical or neo-classical idea of moral responsibility reappears, in a somewhat altered or attenuated form, under the name of psychic responsibility. In any event it leads us into abstruse problems relating either to freedom of the will, or the mental state, of the individual delinquent, which lend little or no practical aid to legislation. The positivist school takes its stand not on moral or psychic, but on 'legal' responsibility which turns on the dangerousness, formidability, or periculosity—to use the Italian expression, *la temibilità* of the delinquent. Now the dangerousness of a unit to the society of which it constitutes a part and parcel, may be viewed from two stand-points. An individual may be a potential danger to society without having actually committed an offending act; his very existence may be regarded as spelling danger to society. Or, an individual may commit an *act* which is dangerous to society. It is only in the latter case that he comes within the purview of law or legislation. Not that society must remain supine in respect of the dangerousness that lurks in the potential criminal. Preventive measures of various kinds may be adopted by quasi-legal, social and philanthropic bodies with a view to counteract, mitigate or even remove, if possible, such elements of danger. Apart from the endeavours of philanthropic institutions, there are police measures which, properly conceived and carried out, may act as effective preventives. Illustrations are not wanting in our own Code of Criminal Procedure, as well as in the (procedural) criminal and police codes of many other countries. But in the sphere of substantive penal law and legislation, mere latent dangerousness not manifested in the form of a delictual act has no juridical existence. The periculosity, in the eyes of law, comes into existence at the moment of the delictual act. The reason is obvious. If the law were to allow repressive or defensive reaction against what is only latent formidability, or potential crime, it would open the flood-gates to abuse, and would itself become a source of danger to the liberty of citizens.

#### NO PENALTY WITHOUT A CRIME

We are therefore driven to the conclusion that law can only take note of danger after the committed (or repeated) act, and not before.

In other words, the criminal act must be the pivot on which legislative or defensive reaction must turn. In this respect the opposing schools, the classical and the positivist, are at one. It will be remembered that one of the fundamental points of the French Revolutionary Code was 'No penalty without a crime'. The penal code, says Von Liszt, is the true *magna carta libertatum* of the citizen, for it tells the criminal of the particular penalty he has to pay for the offence committed by him. He knows exactly the extent of the danger he is bringing upon himself by endangering society. If this be the position of the classical school with regard to penalties or punishments, what must the corresponding position of the positivist school be, in regard to measures of safety? Substituting measures of safety for punishment, the positivist is driven to the corresponding maxim 'No measure of safety without a committed (or repeated) act'.

#### PUNISHMENTS AND MEASURES OF SAFETY

The above would have been a correct representation of the position of the positivist penalist, if he had been an uncompromising advocate of measures of safety only, making no room for punishment in his system. The fact, however, is that even the most redoubtable advocate of measures of safety realises that in the present state of scientific public opinion, of which I have given you some idea in Lecture IV, it is not possible in any projected legislation to make a clean sweep of punishment. There is a strong section of distinguished thinkers who regard the retention of punishment *qua* punishment as necessary for the protection of society, as a means of intimidation though not of retaliation. At the first Congress of the Association Internationale de Droit Penal at Brussels in 1926 the question came to the fore as to whether measures of security (measures de surete) should be substituted for punishment, or should only supplement or complete it. Professor Enrico Ferri was the General Rapporteur on this question. Prior to that he had at one time held the view that punishment in one form or another would always exist, but the aim of society should be to make it only a secondary means of social defence and that measures of safety should become the sovereign remedy. "Penal substitutes", he then said, "should become the main instruments of the function of social defence for which punishments will come to be secondary means, albeit permanent. For in this connection we must not forget the law of criminal saturation, which in every social environment makes a minimum of crime inevitable, on account of the natural factors inseparable from individual and social imperfection. Punishment in one form or another will always be, for this minimum, the ultimate though not very profitable remedy against outbreaks of criminal

activity.”<sup>1</sup> While this indicates his earlier view, there is no doubt that, later, he came to believe in measures of safety as sufficient by themselves. Punishment *qua* punishment had no place in Ferri’s ideal system. But as a compromise he agreed at the Brussels Congress to a resolution comprised of three propositions:— (1) Punishment is not sufficient for social defence; (2) Punishment *in the classical sense* should be conserved; and (3) Punishment should be completed and rendered more efficacious by measures of safety.

The question naturally arises as to how measures of safety, a hitherto untried and unknown system, could be introduced into the already existing system of punishments and whether, if introduced, it would naturally fit into the present framework. If it does not fit in, the only other alternative would be to have two parallel systems, one of punishments and the other of measures of safety. In the last case, the legislature would be called upon to define the exact boundaries of each of these defensive reactions, to provide juridical guarantees for their respective applications and to define the character and content of the ‘measures’ which are to replace punishments, as also the appropriate cases in which they are to do so. I shall endeavour in due course to put before you the various schemes of legislation, either projected or actually enacted in different countries, with the object of giving effect to this idea, namely, that punishment alone can no longer remain as the sole defensive reaction of society against crime, but that ‘measures’ must come in to complete the scheme. Before, however, we come to this interesting subject, we must consider for a moment how it took shape at the Brussels Congress. Although I was present at the Congress I would rather let Ferri describe it in his own words:—

“On the question as to whether measures of security should be substituted for punishment, or in order only to complete it, I was the General Rapporteur.<sup>2</sup> And I find that the reports were all unanimous to recognise that punishment in its classical and traditional sense is no longer sufficient for the exigencies of penal justice. Besides, the report of Professor Coll and mine alone have come to the conclusion that there is no substantial difference between punishment and measures of security as both remain included in the repressive sanctions organised by the penal code. On the other hand, all the others came to the conclusion that the measures of security should simply complete punishment and consequently be applied to offenders, minors or mentally deficient, or lunatics,

<sup>1</sup> *Criminal Sociology*, p. 112.

<sup>2</sup> The rapporteurs were a representative and distinguished body: Jorge Eduardo Coll, Professor of the University of Buenos Aires (Argentina); J. A. Roux (France), Professor of the University of Strasbourg; Enrico Ferri (Italy), Professor of the University of Rome; M. Caloyanni (Greece), Counsel of the High Court of Cairo; W. Makowski (Poland), Professor of the University of Warsaw and Minister of Justice; Radulesco and Valeresco (Roumania); Albert Milota (Czecho-Slovakia), Professor of the University of Bratislava; Thomas Givanovitch (Yogo-Slavia), Professor of the University of Belgrade.

and the habitual criminals; therefore, punishment should be in proportion to the guilt of the delinquent morally responsible, the measure of security being the means of social defence against the delinquents morally irresponsible or more dangerous"<sup>1</sup>.

It will be apparent from the above extract that Ferri was quite prepared to concede that punishment and measures of safety, being a common expression of the sovereign power of the State towards the delinquent, could both be equally afflictive and intimidative, in so far as they were legal measures based upon 'legal responsibility', as defined above. This accounts for his definite statement that there is no substantial difference between punishment and measures of safety, if laid down in the penal code with proper safeguards. The mere substitution of measures of safety for punishments would be void of all meaning. The solution of the problem would really depend on the juridical principle on which either, or both, should depend, *i.e.*, on the criterion of liability. Is that criterion to be moral guilt (responsibility), or social defence (periculosity)? From this point of view the contrary opinion of those who differed from him and who held that punishment should be reserved for the morally responsible, while measures of security should be applied only to the morally irresponsible, betrays an evident confusion of the old and the new conception of liability. Indeed their proposal is a kind of patchwork between the two. It is essential to appreciate Ferri's position a little more in detail before we proceed to consider the recent projects of legislation. On a proper analysis it will appear that the older afflictive punishments have undergone a material change under the neo-classicals. Instead of physical suffering in the shape of torture or mutilation, other forms of repression have come into vogue, such as, fine, deprivation of property, deprivation of freedom, segregation for quite a long and, to all intents and purposes, indefinite period. These punishments can scarcely be called afflictive in the strict sense of the term. They are avowedly negative rather than positive, deprivatory rather than afflictive. They are based on the idea of intimidation or elimination. In this respect they may almost be said to be measures of safety, provided two requirements are satisfied, namely, the criterion of liability be not moral guilt, and the aim and object be *defense sociale*. This is a fundamental point to be remembered while examining the different schemes of legislation. It is when the positivist seeks to apply the measures to the responsible as well as the irresponsible that the difference emerges, and the neo-classicist parts company with the positivist.

<sup>1</sup> *Revue Internationale de Droit Penal* 1927, No. 2, p. 158. Article entitled 'The Italian Criminology at the International Congress of Brussels and Vienna', at p. 161.

Speaking of preventive punishments for the irresponsible, Saleilles observes:

"It must be concluded that the measures to be applied to this class, which we may call punishments for security or elimination, will no longer be punishments in the legal sense of the word, but will now become true measures of preventive regulations, analogous to those taken in regard to the insane. Others have recognised this similarity; the psychological effects of punishment, and the psychological reactions that normally follow upon the application of preventive measures have much the same specific character as punishment itself. Stooss, for example, emphasised this point. It is indeed plain that punishment, properly so called, produces no effect upon perverted natures; for persons of this type cannot be reached by such measures \* \* \*. For certain criminals by birth there is no hope on the moral or psychological side; there is nothing to be done but to eliminate them as one would eliminate a dangerous and uncontrollable creature \* \* \*. But this immunity to the action of punishment is not necessarily irresponsibility. Stooss is content to say—or at least this seems to be his thought—that the repressive measures to be taken against this class have lost their specific character as punishments. For them something else must be adopted, namely, elimination and segregation. But this is not necessarily equivalent to an admission of irresponsibility. The question is one of the definition of punishment; if it is defined by its psychological effects Stooss is right. Punishment for purposes of protection is not punishment in the ordinary sense of the word; they must be differently administered since they look to a different end, and their effects are no longer the same."<sup>1</sup>

No less important is the point stressed at the Congress by Professor Ferri that for any piece of legislation directed against crime, whether it be to lay down punishments or measures of safety, there should be a delictual fact as a pre-requisite to warrant the application of law. Ferri observes:

"Both for punishments and for measures of security there should be found a *delictual fact* which *provokes a judicial act* adapted to the *personality of the delinquent* (special prevention), and of an *undetermined duration* (considering that even nowadays punishments are practically indeterminate, either by way of conditional sentence, or by the effect of pardon, or even more by conditional liberation); one and the other producing the juridical state of recidive and can be alternatively applied by the judge to the same offender (as, for instance, in Articles 22 and 23 of the German draft of 1909)."

In the above passage Ferri practically sums up the attitude of the positivist penalist towards the defensive reaction of the State against crime, whether it be by way of punishment or by way of measures of

<sup>1</sup> Saleilles, *The Individualisation of Punishment*, pp. 145-146.

safety. Punishment under the older conception must be fixed, and, in point of time, of determined duration. Judged from the standpoint of social defence a determined duration has no meaning. The duration must end as soon as the formidability of the criminal ends. That moment may arise either sooner or later than the term fixed. Legislation such as the positive penalist understands must leave the period undetermined, to be subsequently determined by the condition of dangerousness, or otherwise, of the criminal. This point will assume great importance when, later on, we come to discuss the question of Indeterminate Sentence on which turn the questions of conditional sentence, conditional liberation, pardon, etc., as corollaries.

The conclusion which the Congress arrived at was eminently practical. Leaving to theoretical discussions the question as to the substantial or formal difference between punishment and measures of security, the Congress found that punishment considered as the only sanction of offence was not sufficient for the practical exigencies of social defence, either against offenders the most dangerous by their abnormal state, or by their tendencies, or habits of committing offence, or against juvenile delinquents more or less re-adaptable. It proceeded to recommend that the penal code should contain *also* measures for the delinquent more or less re-adaptable to social life, and that "punishment and measures of security should be acts of jurisdiction with the faculty for the judge to apply the one or the other according to the circumstances of the act committed and the personality of the accused". Thus the traditional classical principle was definitely abandoned, and it was agreed that penal laws in future were to aim at the complete realisation of the principle of social defence as the foundation of penal justice.<sup>1</sup>

What was achieved at the Brussels Congress is an indication of how scientific opinion of different schools of thought was converging towards a new aim of penal legislation in the Continent and in other countries. A further indication of this tendency is discernible from the various projects of penal legislation which appeared during the last decade or more, and which we shall presently consider. As regards

<sup>1</sup> The exact terms of the resolution which was passed unanimously are as follows:—

"The Congress records its opinion that punishment as the sole sanction for criminal offences does not meet the requirements of protection against crime, whether as regards offenders who are more dangerous on account of their abnormal mentality, or of their criminal tendencies or habits, or as regards young persons who may be considered more or less capable of being reformed."

This led Prof. Pella of Bucarest to observe:

"The motion of E. Ferri has obtained the adhesion of the Congress. And we profit by this opportunity in order to assert that although the divergencies which may separate some of us and myself from the great Italian penalist, no one can deny the immense contribution brought to the Congress of contemporary penal science by the Positivist School which he represented."—*Roumanie Nouvelle*—25th Oct., 1926.

Anglo-Saxon countries the process of evolution has been somewhat different. The custom and predilection of the continental countries is to receive detailed instructions through the law and to carry out the law as laid down in every detail. Hence legislation takes a pre-eminent place in all matters of penal reform. The genius of England and America, on the other hand, has shown itself in organising institutional experiments in the first instance, and when such experiments have succeeded and answered their purpose then to have legislative sanctions for regularising and extending them. We shall deal with these successful experiments in some of the later lectures.

### NEW LEGISLATIVE PROJECTS IN THE CONTINENT

Of the various Continental projects may be mentioned the Czechoslovak project of 1926, the Greek project of the same year, the German project of 1927, the Spanish project enacted in 1928, as well as the Polish and the Swiss. But the most striking piece of legislative project has fittingly come from Italy, the home of modern Criminology. The first and foremost is the famous Italian project of Enrico Ferri (1921) which was conceived with the out-and-out object of replacing punishments by measures of safety. But the time was not ripe for it, and it was left for Alfred Rocco, Keeper of the Seals and Minister of Justice of Italy, to draft a less ambitious and more conciliatory project in 1927. The provisions of this draft penal code include, in addition to punishments, a complete set of measures of protection. The difference between Rocco's project and other Continental projects consists in this that while the other projects make an attempt to put into the classical framework certain provisions relating to measures of safety, Rocco's project<sup>1</sup> boldly assigns to punishments and to measures of safety their respective places, in order to fulfil their respective functions, so that the code is divided into two parallel parts. It maintains the fundamental classical principle that punishment is to be applied only to those persons who are morally guilty, who have committed the offence knowingly and deliberately, in other words, who are capable of understanding the nature of their acts and of willing their commission. So far there is a concession to classical thought. At the same time the code accepts many of the provisions of Ferri's draft of 1921, particularly in regard to measures of protection, its divisions of criminals into classes being very similar to Ferri's classification, and including also the criminal by instinctive tendency. It, therefore, meets with Ferri's approval who observes, "the draft code marks a very noteworthy step forward on the lines of the positivist school, especially in the practical domain of organising methods of repression in such a way as to meet the

<sup>1</sup> Enacted into law 19th October, 1930, and put in force from 1st July, 1931.

need of society for protection against crime \* \* \* I am not an opponent of penal legislation which, while it abandons the pure doctrine of classic principles, remains still, owing to its obedience to tradition, and to community of sentiment, at the intermediate stage—punishments *and* measures of protection—which represents in a general sense the spirit of the Brussels Congress.” This system in which punishment and measures of safety run parallel to each other is a protest against a mechanical application of punishment in all cases without discrimination, and an attempt to apply punishment to those cases only where it may reasonably be expected to effect reformation, and measures of safety to those cases only where it is expedient in the interests of social defence, the measures varying with the circumstances of each case and with the personality of the offender. It is clear that a necessary prerequisite for application of measures on these principles is a proper classification of offenders by the judge, who is called upon to administer the law. As it is not to be left entirely to the judge to classify according to his own inclinations, Rocco’s Code gives a classification based on Ferri’s project of 1921.

#### THE ITALIAN CODE

To come to the main features of the project, Chapter II of Part VII<sup>1</sup> of the general part of Rocco’s project deals specially with measures of safety. This Chapter is again divided into two portions, the first, articles 200 to 215 concerned with general provisions and the second, articles 216 to 245 laying down a series of special provisions.<sup>2</sup> These latter set out in full detail the different forms of measures of safety, the different cases and kinds of offenders to which they are applicable, the special rules to be observed as to their mode of execution, their duration, cancellation, substitution etc. The parallelism which characterises the project, as mentioned above, will appear on a comparison of some of the articles dealing with general provisions as to measures of safety with corresponding articles in the general sections relating to punishments. Article 1 of the project deals with the fundamental basis of penal responsibility. It states that nobody can be punished for the commission of an act which is not specially mentioned by the law as being punishable, or by means of a penalty not laid down by the law. Article 200<sup>3</sup> (which is the corresponding article relating to measures of safety) lays down the basic principle of the application of measures, stating that nobody shall be subjected to a measure of security which is not specifically laid down by the law, or in cases which are not pro-

<sup>1</sup> In the enacted Code, Part VIII, Book I.

<sup>2</sup> In the enacted Code, Art. 215-240.

<sup>3</sup> In the enacted Code, Art. 199.



vided for by the law. Thus these corresponding articles which regard punishments and measures of safety as separate entities, so to speak, lay down that the fundamental principle governing both is the same, namely, *nullum delictum sine lege*.<sup>1</sup> Similarly, article 2 of the project, dealing with the duration of the punishment and adaptation of the magnitude of the penalty to the criminality of the act, lays down that such adaptation is to be determined solely by the law in force at the time of the commission of the offence. Article 201,<sup>2</sup> again, dealing with the question from the standpoint of measures of safety lays down that measures of security should conform to the law in force at the moment of their execution.

From the instances given above it may at first sight appear that the legislature in the Continent is conscious of the fact that the judge is not ordinarily disposed, while administering the law, to act on his own initiative, but rather to look to the law for guidance in every particular, as far as possible. In the absence of instruction as to the mode of application of any new provision of law, should any reasonable doubt arise, he would even prefer to abstain from acting, with the result that the provision in question would remain a dead letter. Although this is ordinarily the case, the Italian project makes a departure and lavishly vests the judges with discretion. This is illustrated by articles 203 and 204. They provide that a measure of security, except when provided for to the contrary by a special law, can only be applied to persons who are 'dangerous' to society, and who have committed an act covered by the law, even if they are not responsible, or even if they are exempted from punishment. Thus, with the exception of cases where a special law presumes the dangerousness of the criminal, the judge is called upon to exercise his discretion, and with the aid of knowledge of psychology, sociology and human affairs in general, to come to a finding about the dangerousness of the accused at the time when the act in question was committed. In other words, the judge is to go into an investigation as to whether the condition of the accused was such as to constitute a permanent danger to society, owing to the likelihood of his committing new offences, of repeating the old offence, or of his contaminating others, and thus ultimately undermining social order. Articles 205-215 confer upon the judge further discretion regarding the application of measures of safety, side by side with penalty, its suspension and withdrawal, and other problems which arise in the administration either of punishment or of measures of safety, and which call for different methods of execution. It is these provisions of Rocco's

<sup>1</sup> Cf. the present German view as expounded by Dr. Gürtner—Lecture IV, ante.

<sup>2</sup> Art. 200 of the enacted Code.

project<sup>1</sup> which led Ferri confidently to say that the very application of Article 204 would presuppose a knowledge on the part of the judge of psychology and criminal anthropology to enable him to distinguish the criminal by instinctive tendencies from the occasional criminal, the 'passional', and the insane criminal, and the criminal by habit and profession: He prophesied that this provision would act like an injection of pure and oxygenated blood into the science and practice of penal justice.<sup>2</sup>

A distinguished positivist as he was, he was one of those reformers who are not slow to recognise the value of conceding to contemporary scientific opinion, with a view to facilitate practical reform.<sup>3</sup> He had also to consider an important factor nearer home, the Fascist Revolution which had to be reckoned with. Surveying the whole situation and allowing for all the shortcomings of the projected legislation, Ferri thus sums up his estimate of the contribution which it makes to penal legislation of modern times. In his opinion this legislation discloses four essential features: First, it strengthens social defence against criminality, and makes it more efficacious. In this respect the Fascist School and the Positivist School are in entire accord. Secondly, the project keeps intact two traditional conceptions: (i) the presumption that the threat of juridical sanction and of punishment acts as a mode of intimidation, (ii) the principle of moral responsibility of the classical school as expressed by the distinction between delinquents who are morally responsible and those who are not. For the former is prescribed punishment proportionate to the crime and for a determinate term; for the latter, measure of safety (*peine-defense*) for a term indeterminate and revocable by the will of the judiciary. It is in the maintenance of these two traditional principles—the efficacy of intimidation and the basis of moral responsibility—that there is divergence between the positivist school and the new project. For the positivist asserts that the effect of intimidation is much less than is generally believed.<sup>4</sup>

<sup>1</sup> Cf. Art. 39-84 Part III of the enacted Code.

To take one illustration, it is provided that if a man is guilty of something which is not a crime, but for which he is wrongly sentenced he may be set free, but if he is dangerous, the judge can subject him to measures of safety.

<sup>2</sup> Cette injection de sang pur et oxygène que le Project Rocco introduit dans la science et dans la pratique de la justice pénale relative aux délinquants apportera certainement à notre pays un nouvel élan dans les études de panthologie et de la psychologie, criminelle, qui sont déjà une gloire de la science italienne—*Revue Penitentielle de Pologne*, 1928 July p. 160.

<sup>3</sup> "I have been watching for forty years the continued progress of positivist ideas, and since the law of gradual progress is a law of nature, I am not an opponent of penal legislation which, while it abandons the pure doctrine of classic principles, remains still, owing to its obedience to tradition and to community of sentiment, at the intermediate stage—punishments and measures of protection—which represents in a general sense the spirit of the Brussels Congress"—Article by Enrico Ferri entitled 'The Principle of Responsibility at Law,' in the *Revue Internationale de Droit Penal*, 1928, No. 1 p. 51.

<sup>4</sup> "A. paracca whose potency is far beneath its reputation"—*Criminal Sociology*, p. 93.

This is met by Alfred Rocco with the following argument: The whole of society, he observes, may be divided into three groups—a feeble minority at the two extreme points, namely, the virtuous on the one side, and the depraved on the other, with an immense majority in the middle. It is on the last mentioned class, consisting of people who are neither too virtuous, nor too depraved to be above the effect of punishment, that intimidation may have some influence. Thirdly, the new project joins measures of safety to punishments. These measures are not only for delinquents who are morally irresponsible, but also for the responsible by way of exception. Consequently, measures of safety receive a legal status and have the force of legal sanctions. Fourthly, thinks Ferri, there is enough in the Code to justify the expectation that it will enable Italian legislation to take a further march forward and arrive at a point which the present project has not as yet reached. The progress, thus anticipated will take place gradually by replacing moral by social, or legal responsibility, thereby giving to measures of safety a complete legal standing. Notwithstanding the conservation of the principle of moral responsibility in Rocco's project, there will surely come the day, says Ferri, when the principle of social or legal responsibility will in due course be accepted in its entirety in the place of moral responsibility, with the result that measures of safety will form the sole comprehensive Code of Sanctions, as he foreshadowed in his own project of 1921.<sup>1</sup>

#### THE WARSAW CONFERENCE, 1927

Around the advancing idea of legislation which takes into account cases where measures of safety rather than punishments are appropriate and which makes room specifically for measures as also for punishments, there grew up quite a crop of new projects all over Europe. This led to the Conference internationale de Codification de Droit penal at Warsaw in 1927 where, out of twelve Codes of penal law which were actually on the legislative anvil in Europe at the time, seven were taken into consideration, namely, the Italian, the Spanish, the Roumanian, the Czechoslovakian, the Serb-Croat-Slovenian, the Greek, and the Polish, and it was found that all the above Codes purported to join measures of security to punishment which had till then constituted the sole form of penal justice. The same remark would

<sup>1</sup> See Enrico Ferri's article 'Le Project Rocco de Code penal Italien', in *Revue pénitentiaire de Pologne*, July, 1928, pp. 156-7.

Speaking of the complete replacement in future of the idea of moral guilt by that of social defence, he observes: "Whereas Criminal justice having no means of measuring man's moral guilt, which only the omniscience of God can discern, leaves to moral philosophy, to religion and to common sentiment the task of appraising the degree of moral guilt and concerns itself only with recourse to measures of social defence"—'The Principle of Responsibility at Law' by Enrico Ferri in *Revue internationale de Droit penal*, 1928, No. 1 p. 58.

apply to the Codes of Germany, Austria, Switzerland, Sweden, and Denmark which, however, were not before the Warsaw Conference for discussion. To mention others, many of the States of North America (by special law), Norway, Argentina, Peru, Cuba and Brazil have, either by projected Codes or Codes enacted, endeavoured to attain the same end with more or less success. The majority of them have provided punishments for the morally responsible and measures of safety for those not morally responsible, but none the less dangerous. In this respect, it will be observed, the Italian project of 1927 is more advanced as it makes provision for measures of safety also for the responsible (on the ground of legal responsibility).

### PENAL LAW—SUBJECTIVE AND OBJECTIVE

In this connection it is interesting to consider another kind of parallelism, in the administration of penal justice referred to by Saleilles of France whose maxim is: 'Responsibility as the basis of punishment, and individualization as the criterion of its application: such is the formula of modern penal law'. In conformity with the general trend of penal science in France, he does not believe in the renunciation of the old idea of responsibility, but he emphasises the necessity of a positive and practical application of the principle, based on individualization. The criminal act, he says, taken as a whole with all its psychological causes and judged as a unity and a totality should form the basis of punishment; and the punishment should have two standards of measure: "an objective and legal standard, according to the social gravity of the crime abstractly considered, and a subjective standard derived from the criminality embodied in the action, which in turn is determined for the most part by the nature of the emotion or the moral factor which inspired the crime." It will be observed that the objective or legal standard approaches very nearly the dangerousness or formidability (*la temibilita*) of the positivist school, and the subjective standard which relates to the criminal, as distinguished from the crime, takes note of the psychological factors only, in exclusion of the various other factors on which the positivist school lays stress. This parallelism, it need hardly be observed, is quite different from the parallelism in legislation traced above. There is a further parallel system of punishments to which Saleilles refers with approval, namely, the two standards of punishment applicable respectively to political crimes and to crimes of common law. The social gravity of political and common law crimes, he observes, may be identical. Indeed, objectively the political crime often carries graver consequences than the common law crime, which carries direct injury perhaps to a single party. But one must consider

that very often the political criminal is actuated by higher motives. Hence in differentiating the punishment for political criminals, it is not so much the crime as the criminal that should be primarily considered. It is deemed unjust to subject the political offender to the same kinds of punishment as are provided for ordinary criminals, as, for instance, infamous punishments. Minor disabilities should not be cancelled but the idea of disgrace should be eliminated.

Extending the principle adopted in the case of political criminals, the law in France "regards certain common law offences, which in themselves do not imply a true subjective criminality, as similar, in status and in the appropriate punishments to be assigned them, to political offences". Saleilles thus describes it:

"The law may leave entire freedom to the judge, neither guiding nor prescribing his choice. The judge may thus make his own criterion of application, and in this case the criterion may be the consideration of the individual in his entire personality, in place of the individual considered solely in relation to the deed committed. \* \* \* There will be different punishments for those whose crime has been incited by low and perverse sentiments and for those whose crime was incited by sentiments that in themselves are not dishonourable. From this starting point the advocates of parallel punishments proposed to classify punishments in two groups: the one corresponding to infamous punishments \* \* \* and the other to punishments that are not infamous. \* \* \* That is the whole of the system. It is clearly a step in advance. It evidences the growing movement towards a subjective penal law that is towards a penal law that is more humane and more considerate of the individual. The eyes of justice have too long been bandaged and prevented from seeing the position of her scales; and this has given rise to many an injustice. The bandage must be removed. Justice must be given sight and insight that shall be adequate to probe the human conscience, not to find that proof of freedom of action—for this, justice is not equipped—but to sound the moral depth of the offender, a service to be readily and even scientifically performed. The system of parallel punishments is a protest against abstract impersonal justice, which was the ideal of a former generation, but which we reject, because we know its results: criminals by birth who scorn it, or chance offenders whom it brands and ruins. The bandage on the eyes of justice protects the perverts and degrades the chance offender. The former welcome and find support in it; the latter find in it their despair. We demand a justice that sees clearly, that treats perverts as perverts, and the wayward as wayward—as redeemable members of society.<sup>1</sup>

#### THE SOVIET RUSSIAN CODE

Among the recent legislative enactments the Russian penal code of 1927 claims to have completely replaced punishments by measures

<sup>1</sup> Raymond Saleilles. *The Individualization of Punishment* pp. 252-265—William Heinemann, 1911.

of security. How far this claim can be substantiated will only appear on a detailed examination of its scope and purpose, so far as they appear from its provisions. As I have said elsewhere, the only way to test it would be to ascertain (i) the avowed purpose of measures of safety in the Soviet system ; (ii) the juridical guarantees, if any, of their proper application ; (iii) the character and content of the measures which are declared to replace penalties ; and (iv) the wisdom, or unwisdom, of the modes of application prescribed. To begin with, the word 'penal' does not appear in the Code. This, however, is more or less a linguistic accident. Makowski points out that it is easily accounted for by the fact that 'the Penal or Criminal Code' in the Russian language is known as the "Capital Code", not only in Soviet Russia, but it has also been known under this title since the Middle Ages. (ougolounyj kodegs).<sup>1</sup> First as to the purpose, we are told that the object of measures of social defence are three-fold, (a) prevention of new crimes by former offenders, (b) prevention of other members of society, who may be a potential element of disturbance, from commission of crimes, (c) adaptation of the delinquent to conditions of life in the proletarian State (Art. 9). In other words, the object is intimidation. It is difficult to avoid the conclusion that the object aimed at is to employ the measures in view of their deterrent effect on all concerned. Indeed, were we to replace the expression 'measures of social defence' by the term 'punishment', it would do no violence to the substance of the scheme. This conception of measures of security is entirely foreign to the mind of the positivist penalist.

Secondly, as to the juridical guarantees against excessive application of measures of security they are far from being substantial in the Soviet Code. A reference to a few of the articles is sufficient to show that they lay the axe at the root of such guarantees. Under article 46 of the Code the offences are divided into two classes: (a) offences against the basis of the Sovietist Organization established in the Union by the authority of workmen and peasants and considered accordingly as being the most dangerous ; (b) all other offences. Article 16 provides that 'when an act constituting a danger to society is not expressly mentioned in the Code, the measure of importance and the foundation of responsibility for such act shall be determined regard being had to the provisions of the Code relating to those offences which are most nearly analogous.' This provision offends against the wholesome maxim *nullum delictum sine lege*,<sup>2</sup> and renders

<sup>1</sup> *Revue pénitentiaire de Pologne*, Jan.-April, 1929, p. 81.

<sup>2</sup> Cf. the recent exposition of the German view, with reference to the socialist national organisation, by Dr. Gürtner, Lecture IV, *ante*.

possible the application of article 46 to other political offences, although they may not precisely be offences, 'against the basis of the State'. Again, read with article 7, article 16 becomes all the more dangerous. Article 7 provides that all measures of social defence are applicable not only to persons guilty of acts constituting a danger to society (Art. 1), but also to persons who are dangerous owing to their association with a criminal milieu, or on account of their past record. This introduces an alarming factor into the Code and takes away the last vestige of safety which the citizen has a right to expect from the legislature. Ferri's criticisms on this aspect of the Code is perfectly just: "The fundamental standard of social defence against criminality", he says, "clearly comprises measures of prevention (*ante-delictum*). And it is invariably the State which organises and adapts the one and the other in juridical form and order. But the need for a division of the work of providing for social defence requires a distinction to be drawn between laws of prevention (police measures of security) and laws of repression (penal justice). The first are concerned with individuals who are 'socially dangerous' the second with those who are 'criminally dangerous'. It follows that there should be, as a matter of necessity, different standards and different measures according to whether it is a question of prevention or repression. Consequently, in a Penal Code dealing with danger *post delictum*, rules which belong to the category of police measures are out of place. It is the more impossible to approve Art. 7 because Art. 16, as we have seen, introduces the principle of analogy (which can be admitted in regard to measures of prevention), in the case of repressive sanctions, with the result that the citizen cannot know with certainty all the acts which are punishable by the Penal Code".<sup>1</sup>

Thirdly, as to the character and content of the measures. The measures of social defence laid down in the Russian Soviet Code are of three kinds: (i) Medico-pedagogic, (ii) Medical, and (iii) Judicial-correctional. The first are applicable to minors, and consist of (a) tutelage of parents or other guardians or institutions, (b) internment in a medical educational reformatory (Art. 25). The second are applicable to persons mentally deranged, whether chronically or temporarily, or those suffering from any disease such as would take away accountability for their actions, or the capability to control them (Art. 11). These measures provide for internment in a curative institution and compulsory confinement and treatment there (Art. 24). The judge is vested with the discretion to apply the first or the second measure where he thinks that the third is inapplicable (Art. 25). The third are not to be applied to young persons of less than fourteen

<sup>1</sup> *Revue internationale de Droit penal*, part 1, 1928, p. 61.

years of age who are to be placed under medico-pedagogic measures. To those young persons, however, between the ages of fourteen and sixteen who are declared by the Juvenile Delinquent Commission to be unfit for the medico-pedagogic measures, the third may apply (Art. 12). The judicial-correctional measures which form the third class are enumerated in Art. 20. We find there set out besides warning, public reprimand, fine and damages, the following: proclamation as an enemy of the proletariat, together with deprivation of citizenship of the U.S.S.R. and expulsion from the territory of the State; imprisonment in a cell; hard labour, without confinement loss of political and of certain civil rights; temporary banishment restriction of residence; loss of employment, and ban on employment ban on the exercise of one's profession; total or partial confiscation of property. As if this formidable list were not enough, article 21 proceeds to add a special 'measure' for certain grave offences in the following terms: "In order to combat the gravest crimes constituting a menace to the basis of the Soviet power and of the Sovietist State, until such time as this enactment may have been repealed by the Central Executive Committee, in the cases specially provided for by this Code, the penalty of death by shooting shall (except as against young persons, whose age does not exceed eighteen and of women in a pregnant condition) be applied as an exceptional measure for the safety of the proletariat State". When we remember the provisions of article 16 based on the principle of analogy, already discussed, and article 7 which provides that all these measures *i.e.*, judicial-correctional, medical, and medico-pedagogic—are applicable not only to persons guilty of acts spelling danger to society but also to persons who are dangerous owing to their associations or their past record, we cannot help feeling that it gives the impression of a regime of terror. Whether these are called measures or punishments matters very little. It is the system of juridical guarantees that can alone ensure safety to the citizen, and such guarantees seem to have been whittled down to nothing.

Lastly, as to the modes of application of the measures, I need hardly add to what I have already observed under the first three tests applied above. While I have criticised the shortcomings of the Sovietist Code, I am fully conscious of the fact, that it has adopted some of the fundamental principles of advanced penology, namely, that criminals are to be held 'legally' responsible for their crimes, that the application of measures to them must be from the point of view of protection of society, that the severity of the measure is to be regulated in proportion to the dangerousness of the criminal, and that in the application of the measures it is the personality of the criminal that counts. The metaphysical factors traditionally connected



with the doctrine of moral responsibility, the principle of vengeance which still seems to die hard, the doctrine of intimidation as the basis of punishment which is still being declared from the house-tops everywhere, do not at any rate find a place in the letter of this Code. These constitute its points of excellence. It all depends upon how it is administered. If in the actual process of administration of the law, the juridical guarantees do not prove to be like reeds shaken by the wind, the measures, such as they are, will justify their existence. Otherwise, the measures will be reduced to the level of punishments of the classical type, if not worse.

## LECTURE IX

### JUVENILE DELINQUENCY

Lacassagne's epigram: 'There are no crimes, there are only criminals' contains the whole philosophy of modern penology in the West. Law or legislation, which was supposed formerly to concern itself with crimes, is now to regard criminals as its objective. To stamp out criminality, and thus to secure the protection of society, two different kinds of measures may have to be adopted, those against potential criminals, and those against actual criminals. Both sets of measures are obviously aimed at the defence of society; but measures of safety, in the juristic sense, are only those which are adopted to combat actual criminality. The other class of measures embraces social and philanthropic preventives. The history of England and America, as I have already observed, shows that before the law adopted measures of safety alongside of punishment, or in substitution of punishment, social or philanthropic bodies had initiated experimental institutions for irresponsible people, who could not be dealt with by law, such as children, adolescents (under the age of majority), juvenile-adults, inebriates, outcastes, and insanes. Though their efforts were directly aimed at re-habilitating, or reforming as far as possible, the irresponsible members of society who might be potential criminals, they could not always be kept within the limits of potential criminals only. At certain points they over-lapped the sphere of actual criminals. So the work progressed for sometime till these institutions or organizations proved of utility to the State, when legislation came forward and brought the work of reclamation within the principle of State tutelage.

The proper penal treatment of juvenile (*i.e.*, non-adult) offenders now forms a large subject. In the old days the same methods applied to all, young and adult. When the child of tender years broke the law, and committed an offence, howsoever trifling, it was sent to prison like its elders, and subjected to prison life exactly in the same way as the elders. Inherited taint, evil example and surroundings, privation and suffering, culpable neglect of vicious parents, many of these factors might have conspired to cause the criminal act on the part of the child. But the law was no respecter of persons; it made no difference between one criminal and another. The amount of juvenile criminality was appalling. It was found on calculation that under the old system most criminals had made their first lapse at the age of fifteen. Amid the prison surroundings there was no hope of

reformation. The prison was really a breeding ground of crime. No sooner did they get their release than they were driven by impulse or by the force of circumstances to commit some other offence, and thus to return to prison. Children of thirteen or fourteen were found to have committed offences ten, fifteen or eighteen times, and to have been imprisoned as often. Up to the first quarter of the nineteenth century there were over two hundred offences punishable in England with death. A child by reason of his age was not immune from capital sentence. All through the middle ages, and right up to a good portion of the nineteenth century, offending children were treated with great severity. A child of eight years who had, as the usual form of charge ran, "with malice, revenge, craft and cunning" set fire to a barn, was convicted of felony, and was duly hanged. A boy of ten, who confessed to have murdered his bed-fellow, was condemned to death, and "all the judges agreed to the imposition of this penalty because the sparing of this boy simply on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity". Another boy of ten was sentenced to death, because it appeared that he hid the body he had killed, which manifested a consciousness of guilt, and a discretion to discern between good and evil. As late as 1833 a death-sentence was pronounced, but fortunately not carried out, upon a child of nine who broke a glass window, and stole two-penny worth of paint. Many other cases may be cited to show how backward the penal law was just a hundred years ago. The literature on the subject is abundant.

Apart from these atrocious punishments inflicted upon children it is amazing to think that even towards the middle of the nineteenth century thousands of young boys and girls were being actually bought and sold, kept in a state of slavery, underfed, diseased, ignorant, subjected to cruel hardships, and with no remedy and no one to care for them. Following upon the Napoleonic wars, a very great economic and industrial revival came about in England, which made the country predominantly industrial instead of agricultural, as it had been. Financially, it no doubt saved the country, as the economic revolution was followed by great prosperity through flourishing trade and commerce. One of the results, however, was a pressing demand for labour, and helpless children became a pawn in the game of industrial magnates. In every manner of occupation, however arduous the work might be, in the factories, the mines, the brick-fields as well as in agricultural gangs, children were utilised for labour. As Sir William Clarke Hall observes:

"What Queen Victoria found on her accession was a deliberate and systematic traffic in the lives of children that had

grown and prospered until the horrors of it equalled those of the American slave-trade. Through the length and breadth of the land, openly and without shame, children were sold by their parents, and bought like cattle by the employers. The Poor Law Guardians drove a thriving business for their Unions by drafting off unfortunate little ones from five years and upwards, to the Lancashire factories and selling them by the score to the manufacturers as "apprentices".

The life of an "apprentice" was a slavery from which escape was impossible. The rights of the owner were protected by law and the apprentice, if he escaped, was pursued, prosecuted, and punished; but for him there were no rights. Though it were but a tiny child of five, girl or boy, he or she, could be compelled to work the same length of time as an adult. The wheels of the factory machinery never ceased, day or night, and the children, divided into two gangs, worked each for a period of twelve hours at a time. Foetid atmosphere, bad food, want of sanitation, and the constant stooping produced the most terrible suffering, culminating in disease, and a slow and painful death. There was no inspection of any kind, no fencing of machinery, nor any redress for any outrage committed."

Apart from the slavery which prevailed in the factories, the lot of the children outside was no better in respect of squalor and starvation. The time was ripe for legislative interference. Before the reign of Queen Victoria, there were no laws for the protection of children on the Statute Book of England. Legislation was slow to come, as there were vested interests in the way, but public conscience was being gradually awakened by some large-hearted workers, who will always be remembered for having paved the way for reform by their benevolent efforts. Sir Thomas Fowell Buxton (1786-1845) established with the assistance of such co-adjutors as William Wilberforce, Macintosh, Scarlett, and the Gurneys and Frys, the 'Society for the Reformation of Prison Discipline' in 1816. In 1817, he published 'An Enquiry whether Crime be Produced or Prevented by our present system of Prison Discipline'. In 1819 he exposed the scandals in connection with the Convict Transport Ships. Through his efforts two Prison Acts were passed in 1823 and 1824, whereby arrangements were made for cleanliness and sanitation, separate beds, regular labour, and a proper staff in the prisons. Nor must the services of Matthew Davenport Hill (1792-1872) or of Sydney Turner (1814-1879) be overlooked in this connection. While the substantial movement for improving penal methods relating to child offenders was started by these philanthropists, it received a great impetus from the protests of Charles Dickens. These protests led to the first Reformatory School Act of 1854.

<sup>1</sup> *Queen's Reign for Children* by W. Clarke Hall.

## THE RAGGED SCHOOL MOVEMENT.

There were certain constructive institutional endeavours which enabled the public mind to visualise the concrete lines that penal reform for children must take. One of these took the form of the 'Ragged School'. The founder of the Ragged School Movement was one John Pounds (1766-1839). Pounds had been apprenticed to a shipwright. Having suffered an accident he betook himself to the vocation of a shoe-maker. In 1818 he started a school for the poorest children in Portsmouth where he himself worked gratuitously teaching them the three R's, as also cooking and mending of shoes. For many years he drew into his workshop the wildest of boys and girls, whom his singular influence subdued into peace and order. Thus was started the first Ragged School, the parent of the Industrial School, which to-day forms one of the important auxiliaries to the measures of safety against the juvenile criminal. After his death, schools were established in his memory, and Doctor Guthrie, the founder of Ragged Schools in Edinburgh, in 1847, proclaimed Pounds as 'the originator of the idea'. The Ragged School movement caught on. It found a whole-hearted worker in Miss Mary Carpenter, who established a Ragged School in Lewin's Mead at Bristol, and laboured for years until it grew up into a thriving institution, exceeding even her own anticipation. Not only did she herself teach and supervise in the school, but she wrote a series of papers in which she elaborated her views on the Ragged School movement and considerably influenced public opinion on the subject.<sup>1</sup> In 1846 responding to the growing public opinion Lord Houghton introduced a Bill for Reformatory Schools, which, however, was not passed. It was followed, in 1847, by an enquiry into the condition of juvenile offenders by a Select Committee of the House of Lords, but no result followed. About the same time Sheriff Watson started, in Aberdeen, Day Industrial Schools, after the pattern of the Ragged School. In 1849 was established the Free Industrial School in Birmingham where children, not amenable to the law, were housed and fed, and taught some trade. The preliminaries were now complete for the advent of law relating to Reformatory Schools and to child offenders in general.

Meanwhile in 1838 by Act of Parliament an establishment was set up at Parkhurst Prison for the detention and correction of juvenile offenders, to whom pardon was given conditional on their entrance into some charitable institution. The number of juvenile offenders who passed through the prisons of England and Wales was, however, so large that neither the charitable institutions, nor the establishment at

<sup>1</sup> Her activities extended to India which she visited and where she started Ragged Schools on the same lines.

Parkhurst could cope with the requirements. London alone contributed a third of the total number, which, in 1854, reached 14,000. Sixty per cent of the total number were aged between fourteen and seventeen. Forty per cent had been committed to prison more than once, and eighteen per cent four times or more. It was at this juncture that the first Reformatory Schools Act was passed. It substituted the school for the gaol. The Magistrates were empowered to send delinquents, guilty of acts punishable by short imprisonments, to schools. The limit of short imprisonment was at first fourteen days, and afterwards became ten days. The Act, however, had many flaws, one of them betraying the old retaliatory idea. It provided that there must be a short period of imprisonment in jail, before the offender could be sent to the Reformatory. In effect, it frustrated the whole purpose of the Reformatory School, namely, to prevent the shame and the contamination of the prison, which had a baneful effect upon the young minds. (It was not until 1891 that this clause about preliminary imprisonment was abolished.)

#### THE SUMMARY JURISDICTION ACT, 1879.

The next piece of legislation which made some provisions relating to children and young persons is the Summary Jurisdiction Act, 1879 (42 and 43 Vict. C. 49). Sections 11 and 15 which relate to the above descriptions of offenders, really under State tutelage, are instructive for the purpose of showing how the law made no allowance for child psychology, or the special requirements of the juvenile. It is true that up to the age of seven the child was presumed to be *doli incapax* i.e., incapable of felonious intent, and after that age such presumption was open to rebuttal. This affected the substance of the charge. But it never occurred to the legislature at that stage that even with regard to the procedure for being brought up for trial and being actually charged and tried, the ordinary methods relating to adults were highly inappropriate, and positively mischievous, when applied to non-adults. Section 11 of the Summary Jurisdiction Act of 1879 furnishes an instance in point. It provides that where a young person is charged with larceny, or one or two other kindred offences, the Court having regard to the character and antecedents of the person charged, the nature of the offence and all the circumstances of the case, if satisfied by the evidence that it is expedient to deal with the case summarily, "shall cause the charge to be reduced into writing and read to the young person charged and then address a question to him to the following effect: 'Do you desire to be tried by a jury or do you consent to the case being dealt with summarily', with a statement, if the Court think such statement desirable for the information of the young person

to whom the question is addressed, of the meaning of the case being dealt with summarily, etc., etc. On reference to section 12 it will be found that the procedure is exactly the same for an adult, with the only difference that if the child be under 12 years of age the parent, and not the child, exercises the right of election. 'Young persons', i.e., children between the age of 14 and 16 have the right themselves to elect. Now it is not difficult to imagine the confusion which the whole atmosphere would naturally cause in the mind of the young delinquent. After the charge has been solemnly read out to him "for that he did on the —day of—feloniously and burglariously break and enter etc., etc.", comes the question in the shape of a conundrum! Happily, all this is now obsolete. But unless we briefly go through the steps and stages of development, which took long years to accomplish, it is not possible to visualise how penal law relating to young persons has come to be what it is. The trial of children, as distinguished from that of adults, must be simple and void of the traditional formalities which convey no meaning to the child mind, and which, by inspiring terror instead of hope, may do endless harm to it. Hence the establishment of Juvenile Courts to which we shall presently come. There are two more provisions in the Act of 1879 which call for a passing reference. Sub-section (3) of Section 11 provides that the section will not prejudice the right of a court of summary jurisdiction to send a young person to a reformatory or industrial school. It is noteworthy that it is a permissive provision giving to the court the option to choose reformatory treatment as an alternative. Section 11 also provides for birching as a discretionary measure. That is a question which must be dealt with, later on, in its proper place. The efficacy of flogging or birching, specially with reference to young offenders, has remained a moot-point for many years and even as late as 1939 when the new Criminal Justice Bill was under discussion, opinion appeared to be divided. Section 15 of the Act of 1879 laid down that: "A child on summary conviction for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, shall not be imprisoned for a longer period than one month, nor fined a larger sum than forty shillings". It will be apparent from it that the mischief of short sentences of imprisonment had not as yet been realised by the legislature. To send a young delinquent to prison for one month means leaving on his mind an indelible impress of prison life and, by association with confirmed criminals, giving him an effective training in crime.

Apart, however, from what this legislative enactment and a few that follow purport to do for children and young persons, they represent a distinct advance in another important particular: they vest in the judge an amount of discretion, which he did not previously enjoy,

to mitigate the punishment, to suspend it, or to do away with it altogether, as he thinks right, having regard to the circumstances of each case, thus making it possible for the judge to function as an individualizing agency, fitting the punishment to the criminal. Section 4 provides "Subject as in this Act mentioned, and notwithstanding any enactment to the contrary, where a court of summary jurisdiction has authority under this Act, or under any other Act, whether past or future, to impose imprisonment or to impose a fine for an offence punishable on summary conviction, that Court may, in the case of imprisonment, impose the same without hard labour, and reduce the prescribed period thereof, or do either of such acts ; and in the case of a fine, if it be imposed as in respect of a first offence, may reduce the prescribed amount thereof. And where a Court of summary jurisdiction has authority under an Act of Parliament other than this Act, whether past or future, to impose imprisonment for an offence punishable on summary conviction, and has not authority to impose a fine for that offence, that Court when adjudicating on such offence may, notwithstanding, if the Court think that the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding twenty-five pounds, and not being of such an amount as will subject the offender under the provisions of this Act in default of payment of the fine, to any greater term of imprisonment than that to which he is liable under the Act authorising the said imprisonment".

Section 16 of the Act goes a step further. It provides that if upon the hearing of a charge for an offence punishable on summary conviction under the Act, or under any other Act, whether past or future, the Court think that though the charge is proved the offence is in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, the Court, without proceeding to conviction, may dismiss the information, and, if the Court think fit, may order the person charged to pay such damages not exceeding 40 shillings and such costs of the proceedings, or either of them, as the Court think reasonable.

What follows as an alternative provision in the same section is of greater consequence. It is in these terms: "*Or*, the Court upon convicting the person charged may discharge him conditionally on his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the Court think reasonable (Provided that this section shall not apply to an adult convicted in pursuance of this Act of an offence of which he has pleaded guilty, and of which he could not, if he had not pleaded guilty, be convicted by a Court of summary jurisdiction).



It has to be remembered in this connection that the Courts of summary jurisdiction are responsible for nine-tenths of the prison sentences. "The first introduction of a prisoner to a prison, which means so much to him and to society, is therefore in the hands of the courts of summary jurisdiction. There are over one thousand of such courts, and, except for the metropolitan area, only about eighteen are presided over by stipendiary magistrates."<sup>1</sup> The large majority of these courts is presided over by honorary magistrates. In consideration of these facts it will be apparent that the provisions of the Act confer upon these courts a great deal of discretion to adapt the punishment, or the measure of safety, to the personality of the accused and to the requirements of public safety.

#### PROBATION OF FIRST OFFENDERS' ACT, 1887.

The 'conditional discharge', provided for in sub-clause (2) of section 16 of the Act of 1879, is taken a step further by the Probation of First Offenders Act, 1887 (50 and 51 Vict., C. 25), which represent a further advance in judicial individualization. It is an Act to provide for conditional release of first offenders in certain cases. It lays down that in any case in which a person is convicted of larceny or false pretences or any other offence punishable with not more than two years' imprisonment before any court, and no previous conviction is proved against him, if it appear to the Court before whom he is convicted that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient for the offender to be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognisance, with or without sureties, and during such period as the Court may direct, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

The difference between the provision in the Act of 1879 and the Act of 1887 in respect of conditional discharge is that in the former there is at least one case contemplated in which the Court without proceeding to conviction may make a conditional discharge, whereas in the latter the Court proceeds to conviction but does not pass the sentence at once. In either case there is a conditional discharge or

<sup>1</sup> Address by Sir William Jowitt, K.C., Chairman of a Conference held in the Middle Temple Hall on the 3rd April, 1935 at the instance of the Howard League for Penal Reform to discuss the question of reform of Courts of summary jurisdiction.

release.<sup>1</sup> This is on the same lines as the law of 1891 known in France as the Berenger law or the law of *sursis a l' execution de la peine*. The Paris International Congress of 1895 also came to the conclusion that "those penal systems which recognize the discretion of the Courts to suspend execution of sentence in the case of first offenders committed for short terms give expression to a most admirable tendency." But the system of suspended conviction, or suspended sentence, is not necessarily restricted to cases of short sentence. In English law and practice there is no doubt intimate relation between the two, also with Probation, about to be discussed. Sir Evelyn Ruggles-Brise deals with the question on that footing.<sup>2</sup> Saleilles, however, observes that *sursis*, as understood by Berenger, is not necessarily confined to cases calling for short sentence:

The judges were given the means of saving those who appeared before them for the first time. They of necessity had to test the motives and sentiments of the defendants, it was for them to appraise and judge, and the law prescribed no further or partial instruction. The law of 1891 did not even make a distinction in terms of the gravity of the offence. It considered all cases of corrective imprisonment irrespective of duration, even cases involving the maximum legal period of five years and cases assigned a corrective punishment by reason of provocation, or of mitigating circumstances in the charge. \* \* \* It was the intention of the law that the judge should take into consideration not the objective gravity of the deed, but the chances of reform of the individual ; and upon that the crime has no bearing<sup>3</sup>.

Speaking of the exercise of pardon, Saleilles further observes:

Wherever disciplinary authority exists, whether in the family in favour of the father, or in government, in favour of superior official, the first law of good discipline if that indeed is the object—is almost always, except in absolutely serious cases, to pardon the first offence. Shall society alone refuse to exercise pardon? It is only in deference to an outgrown abstract system of absolute equality that the law is law, and that to suspend its application requires the authority of those who make the laws. Those who have the power to make laws have only to delegate to others, the power to suspend or to regulate their application<sup>4</sup>.

The above two Acts illustrate a partial exercise of this power of delegation. The proviso to Clause (2) of Section 16 represents a

<sup>1</sup> 'Conditional discharge' or 'conditional release', as used in this context, should not be confused with another use of the same expressions under circumstances quite different. An offender *while already serving his period of sentence*, or while being detained in an institution such as the Elmira Reformatory *under indeterminate sentence*, is given conditional liberation *on parole*. Those cases will be dealt with later.

<sup>2</sup> See his *Prison Reform at Home and Abroad* pp. 59, 60, 64.

<sup>3</sup> *The Individualization of Punishment*.—Heinemann, 1911.

<sup>4</sup> *Ibid.*

refusal to exercise this power where it might have been, in particular circumstances, in the interests of society to do so.

Section 562 of our Code of Criminal Procedure (Act 5 of 1898), amended up to date, adopts the same principle in the case of first offenders, with certain limitations. It provides that the conditional release may be granted on probation of good conduct, after conviction, suspending the sentence. It runs thus: When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment, for not more than seven years, or when any person under twenty-one years of age, or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character, or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour. Sub-clause (1A) provides that in any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating, or any other offence under the Indian Penal Code, punishable with not more than two year's imprisonment, and no previous conviction is proved against him, the Court before whom he is so convicted may, if he thinks fit, having regard to the age, character, and antecedents, or physical or mental condition of the offender, and to the trivial nature of the offence, or to any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition. This sub-clause, it will be observed, can only come into operation when the offence in question is under the Indian Penal Code, not under any other enactment, such as the Indian Railways Act, the Municipal Act, the Motor Vehicles Act, etc. The provisions of the Act dealt with, if properly applied, would lead to excellent results. But in the absence of a proper system of Probation, or institutional treatment, the object of the section is well-nigh frustrated. In practice it is found that it is mainly applied to cases of young offenders. There is considerable reluctance on the part of the Court to exercise the power vested in it, in favour of adults except in the case of petty offences. The judicial decisions, to which I need not refer, also point out the need for extreme caution in the exercise of the power given to the Court, to guard against danger to the public, and danger to the accused himself. Sub-clause (1A) is really an adaptation, with certain variations, of the English

Statute, the Probation of Offender's Act of 1907 (7 Edw. VII C. 17) which we must presently deal with.

In regard to the English statutes, hitherto considered in this lecture, it is noteworthy that the main points which the courts were called upon to consider were not only the youth, character and antecedents of the offender, but the objective gravity of the offence itself. If the offence were not of a trifling nature, but one of the graver ones, it might weigh with the Court to disqualify the person charged from enjoying the benefits of the Act, although a consideration of the personality of the offender might have disclosed that he was not of a criminal temperament, and that he deserved to be treated otherwise than by punishment. The earlier and the orthodox system had been that of fixed punishments, giving the Court no option but to inflict the punishment prescribed. The first step was taken when the legislature was content to lay down the limit of duration of the penalty, as in most Codes of the present day, the Court being authorised to fix the penalty anywhere within the prescribed limit. This gave an opportunity to individualize the punishment within the limit fixed, and thus in some measure, though very small, it did away with the extremely mechanical character of the old system. The next step was, as we have seen, to give the court the power of granting conditional sentence, or even suspend the conviction and grant a conditional release. These gradual changes testify to the acceptance of the principle that punishment is not all in all, and that the real remedy lies in measures of protection—of society, as well as of the individual offender. But the method of application of that sovereign remedy is still defective, because under existing conditions the Court has little or no opportunity to get in touch with the personality of the offender, which is the most essential condition for satisfactory individualization. It is well known that, under the existing law, only those facts are deemed relevant which are incidental to the guilt of the accused. In the ordinary course of things, no one would be entitled to draw the attention of the Court to facts concerning the personality of the offender—they are irrelevant. Hence the knowledge of the judge has, under the existing administration of justice, to be confined to the facts and circumstances connected with the actual offence charged.

#### THE PROBATION OF OFFENDERS ACT, 1907.

The Probation of Offender's Act of 1907 repealed section 16 of the Summary Jurisdiction Act of 1879, and the Probation of First Offender's Act of 1887, and gave wider powers of individualization to the judge in respect of granting release. It provided that, if the Court was of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of

the offence, or to the extenuating circumstances under which the offence was committed, it would be inexpedient to inflict any punishment or any other than a nominal punishment, or that it would be expedient to release the offender on probation, the Court would be competent to dismiss the charge altogether, even if the charge was proved, and, if the Court so thought fit, might bind the offender over with or without sureties, to appear for conviction and sentence when called upon at any time within a specified period not exceeding three years. The Act makes provision for the appointment of probation officers, and also of special probation officers called children's probation officers (Section 3); for their duties and functions (Section 4); and also lays down that the Secretary of State may make rules for prescribing such matters incidental to the appointment, resignation, and removal of probation officers, and the performance of their duties, and the reports to be made by them, as may appear necessary (Section 7). Section 4 describes in detail the duties which the probation officer is to discharge. It is his duty, subject to the directions of the Court, (a) to visit or receive reports from the person under supervision at such reasonable intervals as may be specified in the probation order, or, subject thereto as the probation officer may think fit; (b) to see that the probationer observes the conditions of his recognizances; (c) to report to the Court as to his behaviour; (d) to advise, assist, and befriend him, and, when necessary, to endeavour to find him suitable employment. Thus one of the fruits of the system of suspended conviction, or sentence, is Probation, and the Act of 1907 just dealt with was the first legislative expression of public approbation of the Probation System.

Later enactments have elaborated the system and made it an integral part of the administration of justice. The excellence of the system depends on the personality of the probation officer. As observed by a well-known writer:

'If probation is anything more than a mitigation of the severities of the law, it is no exaggeration to speak of the probation officer as the most important part of the probation system. He himself is the reformatory, the walls, the discipline, and the good influences, all combined in his own person, and he must, therefore, be the great positive vitalizing force in the life of the offender placed on probation'.<sup>1</sup>

The probation system is now not an appendage to the law relating to juveniles or adolescents only, i.e., to offenders of the age of twelve to sixteen, or sixteen to twenty-one, but to all offenders. The Probation Officer is an essential factor in the administration of justice in its

<sup>1</sup> Robinson, *Penology in the United States*, pp. 206-207.

various stages, at the trial or during the period when the trial of the young offender is pending, after the trial when the offender, young or adult, is placed under his supervision on condition of good behaviour; during the period when the offender may be undergoing his sentence; and, finally, after his release from prison, if to prison he went, for assisting him to go straight after discharge and not revert to crime. In short, the Probation Officer is an integral part of the modern scheme of measures of safety, in the best sense of the term.

Without touching on the different stages which legislation had to go through in order to evolve the measures of safety in regard to children, juveniles and juvenile adults, we may now consider the final form that legislation took in the consolidating Acts.

### THE CONSOLIDATING ACTS

The main enactments which are material for this purpose and which were consolidated subsequently are the Probation of Offenders Act, 1907, the Prevention of Crime Act, 1908, the Criminal Justice Administration Act, 1914, and the Children Act, 1908. They were followed by the Criminal Justice Act, 1925 (15 and 16 Geo. V. C. 86) and the Criminal Justice (Amendment) Act, 1926 (16 and 17 Geo. V. C. 13), the Children and Young Persons Act, 1932 (22 and 23 Geo. V. C. 46), as also the Children and Young Person's Act, 1933 (23 Geo. V. C. 12).<sup>1</sup> The present law to be found in these principal Acts, as amended by the Consolidating Acts, is really divisible into two sets of provisions, one set consisting of juridical sanctions, relating to measures of safety in the proper sense of the term: they contemplate the steps to be taken for meeting a situation that arises upon a committed, or repeated act of crime; and relate to children and young persons, or first offenders and habitual offenders, as the case may be. They lay down in detail the procedure to be adopted by the Court when specific situations arise. Reformatory Schools, Industrial Schools, Certified Schools or Approved Schools, (sec. 79) Remand Homes (Sec. 77), Voluntary Homes (Sec. 92), and various other kindred institutions are duly recognised, and their functions duly defined. Ample discretion is given to the Courts to select, and, according to the circumstances of each case, to send the offender to one or other of these institutions for custody and care. The Probation system is given a recognised position in the legal scheme, and the duties and the functions of Probation Officers, and the jurisdiction of probation areas are

<sup>1</sup> The Children and Young Persons Act, 1933, is a consolidating Act. It embodies most of the provisions of the Children Act, 1908, the Children and Young Persons Act, 1932, and the other Statutes. It does not, however, entirely repeal and replace the Acts of 1908 and 1932, some sections of which remain in force.

definitely set forth in the enactments. In case any further details may be needed, power is given to the Secretary of State to frame rules for guidance of the institutions or of the officers concerned. It will be apparent from the above that the whole of the law on the subject has now grown into a system of State tutelage under which punishments have ceased to be punishments, or at any rate are in course of being transformed into what the positivist school would call measures of safety.

### PREVENTIVE AND PROTECTIVE MEASURES

We turn now to the other set of provisions which do not contemplate an actual crime, but which seek to remove factors that constitute the breeding ground of crime. They are measures of prevention which serve to assist society through State intervention to remove the causes of crime. In regard to children and young persons a good many sections of the consolidating Acts of 1933 provide for such protective and preventive measures. Constitutionally, children and young persons have always been regarded as entitled to protection from the Courts of Chancery. This protection even after the Judicature Act, is afforded in matters of civil law. A criminal child or young person, however, was beyond the arm of the Chancery Court. The Consolidating Act has practically brought the law to admit that Courts should have power to assume guardianship, not only over children who have committed offence, but also over those who are living under conditions likely to lead them into delinquency or immorality. In order that the arm of law may extend even to cases where no actual crime has been committed, the Act defines a child and a young person and then takes them within its protection. Under section 107 a 'child' means a person under the age of fourteen years, and a 'young person' means one who has attained the age of fourteen years, and is under the age of seventeen years. Section 50 lays down that it should be conclusively presumed that no child under the age of eight years can be guilty of any offence.

With reference to the above mentioned persons under State tutelage the Act lays down preventive or protective measures of various kinds of which a few typical illustrations will suffice: Subjecting to cruelty a person under sixteen; causing or encouraging seduction or prostitution of girls under sixteen; allowing persons under sixteen to be in brothels; causing or allowing persons under sixteen to be used for begging; giving intoxicating liquor to children under five; causing or allowing children to be at any time in the bar of licensed premises during the permitted hours; preventing children from receiving education, exposing children under seven to risk of burning, failing to

provide for safety of children at entertainments ; prohibiting persons under sixteen from taking part in performances endangering life or limb etc.

Coming now to some of the other important provisions of law, we turn to Section 51, which removes all disqualifications traditionally attaching to felony, and lays down that no conviction or finding of guilt of a child or young person shall be regarded as a conviction of felony. Section 52 lays down restrictions on punishment of children or young persons, thus:—(1) a child shall not be ordered to be imprisoned, or be sent to penal servitude, for any offence, or be committed to prison, in default of a payment of a fine, damages, or costs, (2) a young person shall not be sent to penal servitude for any offence, (3) a young person shall not be ordered to be imprisoned for an offence, or be committed to prison in default of payment of fine, damages, or costs, unless the Court certifies that he cannot be detained in a remand home, or that he is of so depraved a character that he is not a fit person to be so detained.

#### PROBATION.

Probation may well be regarded as America's contribution towards the growing scheme of measures of safety. Its beginnings are associated with the practice of suspending sentence<sup>1</sup> and letting off the prisoner on promise of good behaviour, backed up by a financial guarantee, or surety to the satisfaction of the Court, that if the offender did not maintain good behaviour he would be available for serving out the sentence. This was found to have a wholesome effect on the mind of the offender. To consolidate this good effect it was found expedient to place the offender under the guidance of a sympathetic person who could establish contact with the mind of the offender, gain his confidence and thus act as a guide philosopher and friend to him during this critical period. At first, such friendly service came from volunteers who thus became the prototypes of the present day probation officers and the pioneers of the probation system. Sutherland records<sup>2</sup> a notable case of such voluntary service. Among the early volunteers, he says, was John Augustus, a shoe-maker of Boston who, in 1849, secured the release of a confirmed drunkard from the police court of Boston by acting as surety for him. This offender subsequently turned out to be a sober, industrious citizen under his influence, which encouraged Augustus to extend his sphere of usefulness by standing surety for many others and thus effecting their release. Thus it came to pass that in

<sup>1</sup> A suspension may be a suspension of the imposition or suspension of the execution of sentence.

<sup>2</sup> Sutherland's *Criminology*, p. 561—Lippincott, 1924.



the course of seven years he acted as surety for 253 males and 149 females in an amount that totalled 15,320 dollars not one cent of which did he have to forfeit as none of his charges violated the conditions of his release. His example was quickly followed by others, so that volunteers became numerous. These were the probation officers before probation was authorised by statute. Robinson quotes a similar instance. He thus sets out the early history:

Probation arose in Massachusetts. Officially, it dates from a law of 1878 authorising the Mayor of Boston to appoint a probation officer for Suffolk County. For some six years prior to this the work had, however, been carried on unofficially. About the year 1872, a large-hearted man, Father Cook by name, began his work of ministry in the criminal courts of Boston. He succeeded in gaining the good will of the judges and, where it seemed that the offender stood in more need of a wise and sympathetic friend than a sentence, the case would be continued and the offender turned over to Father Cook. Two years after Father Cook's work had been given legal sanction in Suffolk County, the system was extended to the entire State. City aldermen and select men of towns were authorised to establish the office of probation officer. The law was merely permissive, however, and not much was done under it to extend the work. But after the usual twenty years of incubation \* \* \* the system was made compulsory (1891) for the entire State, in the form which in the main it now has in that State<sup>1</sup>.

In 1899, the system ceased to be a purely Massachusetts institution. In that year Rhode Island passed a law providing for both juvenile and adult probation and in the same year Minnesota and Illinois followed. Since then there has been steady expansion of the system till in 1921 the figures showed that thirty-five of the States and the District of Columbia had adopted adult probation, and, as for juvenile probation, as many as forty-seven States besides Alaska, Porto Rico, Hawaii and the District of Columbia had adopted it. Later figures are not available, but there can be no doubt that during the last twenty years or so probation has made even more rapid strides. Thus, though it began first with juveniles, it has established its utility as an institution almost indispensable to a complete scheme of measures of safety, in the New World.

In England, it first received legislative recognition in the Probation of Offenders Act, 1907, as already observed. It was further recognised by the Criminal Justice Administration Act, 1914, which provided *inter alia* that a recognisance under the Act might contain such additional conditions with respect to residence, abstention from intoxicating liquor, and any other as the Court might consider necessary. (Sections 8

<sup>1</sup> *Penology in the United States*, p. 195—The John C. Winston Co., Philadelphia, 1923.

and 9). It authorised the Court to place the youthful offender within the reach of recognised and subsidised societies, or voluntary homes, for care and guidance during the period of probation. Under Section 25 of the Children Act of 1908,<sup>1</sup> the Secretary of State was empowered to cause all voluntary homes to be inspected and to appoint officers to make such inspection, thereby bringing all such homes within the State machinery for measures of safety. The principle underlying all these measures is to substitute for punishments an intimate personal relationship which subserves the purpose of *defense sociale* with more efficacious and abiding results. "From a social point of view", it has rightly been observed, "it (probation) may be said to be a process of educational guidance through friendly supervision. Mere surveillance is not supervision. Probation is an intimate personal relation which deals with all factors of a child's life, particularly his home. This conception of probation as a vital, active force naturally carries with it the requirement that those who exercise the function—the probation officers—should be trained, sympathetic, experienced men and women".<sup>2</sup>

#### THE LONDON CONGRESS, 1925.

The year 1925 saw the session of the International Penitentiary Congress in London, in the month of August. It proved momentous in the history of probation. The subject of probation came up for discussion in connection with the problem of short sentences of imprisonment which had been keenly and abundantly criticised for years as well in literature as in congresses. It was thought that the country where the Congress was holding its sessions would be able to furnish some valuable data for discussion as to the results of the change in law effected by Statutes which allowed the infliction of fines for petty offences, and time for payment in order to facilitate and ensure such payment. Lord Hewart of Bury, Lord Chief Justice of England, who opened the deliberations on this subject, dealt with it in its diverse aspects—the mischief of standardized punishments, and of short sentences of imprisonment and the necessity for individualization by judges—and finally pointed to probation as an invaluable method of protecting society by means other than punishment. He said:—

It is not suggested that the ends which are sought by imprisonment should be diminished, much less that they should be abandoned. The problem is to find and to apply, in proper cases, not an unsatisfactory but a real and more satisfactory

<sup>1</sup> The first comprehensive enactment relating to children and young persons: "An Act to consolidate and amend the law relating to the protection of children and young persons, reformatory and industrial schools and juvenile offenders and otherwise to amend the law with respect to children and young persons."

<sup>2</sup> *Juvenile Courts and Probation* by Flexner and Baldwin p. 79 *et seq.*—The Century Co., New York, 1916.

alternative method of fulfilling those purposes which the welfare of society needs to have fulfilled, and which, as things stand, are normally fulfilled by a punishment consisting in imprisonment. \* \* \* We are to look to the common society, to the security of all, and to making less likely the doing of similar wrongs in other cases. \* \* \* Society, after all, consists not of classes but of individuals and it is the first and most elementary task in any adjudication to try an individual case on its merits. One hears sometimes of what are called "standardized sentences". But the standardization of sentences means the abdication of the judge. Fortunately for mankind, neither sentences nor offenders are standardized, and the very same considerations of public interest as those which require that one man should go into penal servitude for ten years may require that another man should not go to prison at all. \* \* \* What is not so generally recognised is, that there are few more effectual ways of manufacturing criminals than to send young offenders unnecessarily to prison, where they may easily find themselves far more comfortable than they expected to be, where they may perhaps make acquaintance with men and methods likely to bring them to ruin, and where, after serving some short sentence of complete futility, they may abandon forever their repugnance to prison and all that it involves. Grave indeed is the responsibility of those who, otherwise than in a case of clear necessity, send any youth or girl, or indeed any man or woman, to prison for the first time.

Lord Hewart then proceeded to consider the special contribution that the legislature had made to penology through the Summary Jurisdiction Act, 1879, the Probation of First Offenders Act, 1887, and the Probation Act, 1907, which we have already dealt with. In conclusion the Lord Chief Justice made certain observations upon the actual working of the Statutes above mentioned, and of the probation system in general, which, coming as they do from the highest judicial authority, may almost be taken to be rules of guidance for judges and probation officers.

It may be convenient to state quite shortly certain propositions which seem to be reasonably clear, with reference to the actual working of the system of probation:—

(1) It is a system which has by no means been uniformly employed. In some districts, apparently, it is employed but little, and in some districts not at all.

(2) There is evidently in some quarters an impression that probation has nothing to say to cases which are not in themselves insignificant. But this view ignores the plain terms of the Statute. The 'trivial nature of the offence' is only one among many of the alternative grounds to which the Court is empowered to have regard.

(3) In 1923 rather more than 603,000 persons were tried in the Courts to which the Statute applies. Of this number, some 12,600 persons were placed on probation—that is to say, about 2 per cent.

(4) There are many petty sessional divisions in which although the Probation Act of 1907 is now 18 years old, no probation officer has yet been appointed. There seems to be no good reason why any petty sessional division should be denied the advantage of a probation officer's services.

(5) A dangerous enemy of the probation system, as of all good things, is the temptation to be perfunctory. What is wanted is extreme care and patience in the drawing up of the order, in the making of the conditions and not the least in working them out.

(6) Justices of the Peace are now as numerous as they are public-spirited. It might be a most useful service if Justices, when they release an offender on probation, were to "follow the case" and see for themselves that the probationer is behaving himself and abiding by the conditions. Happily, there are now many women who are Justices. Is it to be thought that, in dealing with women and girls who are probationers, the goodwill and the good sense of women Justices might not be most usefully employed?

(7) It is not merely of some but of great importance that the Court when it releases an offender on probation, should be most careful not to convey any impression that probation means "letting off" for a first offence. It ought to be made clear to the offender that the offence is proved, that discipline, recognizances and conditions are necessary in his case, and that if he is not sent to prison it is only because it is believed that to make him a probationer is the best way of enabling him to live down his offence, and to reinstate his character by his own efforts, aided by the experience and the sympathy of the probation officer.<sup>1</sup>

The year 1925 was signalized by another important event, the passing of the Criminal Justice Act in December of that year, the first part of which consisted entirely of provisions relating to the probation of offenders, the regulation of probation areas and committees, the selection of probation officers, the employment of agents of voluntary societies as probation officers; their salaries and expenses etc., also giving power to the Secretary of State to make such rules as may be necessary to carry the Act into effect. The scheme is as follows:—The country was to be divided into probation areas. Each petty sessional division would form a separate probation area, but for the convenience of administration the Secretary of State was given power to combine two or more divisions into a single probation area. Initiative was given to Courts of Quarter Sessions to prepare such schemes of combination and submit them to the Secretary of State for consideration. One or more probation officers must be appointed for each probation area. It did not necessarily mean that where there were only few cases in the year suitable for probation, a Court must appoint a full-time probation officer. It might be possible sometimes

<sup>1</sup> *Proceedings of the Ninth International Penitentiary Congress*, pp. 244-252 —Staempfli & Cie, Printers, Bern (Switzerland), 1927.

to employ a qualified man or woman engaged in other social work, and willing to render part time service, but at other times the better plan would be for such Courts to be associated with neighbouring Courts under the system above mentioned so that they could share the services of the same officer. Having regard to the duties of the probation officer, and the difficulty of finding persons, possessing the requisite qualifications, better results might be attained by entrusting the work to whole-time officers. Great importance was attached to the local administration of probation work. The Justices, with the help of probation committees were made responsible for appointing the officers, paying their salaries, and supervising their work, subject to rules made by the Secretary of State. It was also made clear that the agents of voluntary societies might continue to be appointed for the purpose of probation work. Missionary and probation work in police Court was initiated by voluntary Societies, and in many cases the best interests of the cause might be secured by utilising available resources.

Despite the encouragement from the highest quarters which probation has received, its spread in England has not been commensurate with its acknowledged importance. As compared with the United States the volume of work is poor. Sir William Clark Hall in giving the figures of about a decade ago observes:

When it is realised that in one single juvenile Court in America nearly as many children are placed on probation in a year as in all the juvenile Courts in England and Wales put together, it will be seen how small has been the development of the probation system in England compared with that in the United States. The exact figures are 3,343 children placed on probation in the New York 1st Division Children's Court, with a population of under 3,000,000. This is as against only 5,812 children in England and Wales, with a population of over 37,000,000. These figures would seem to show that we are in England still largely neglecting a very economical and, I believe, a very efficient means of dealing with juvenile delinquents. The enormous difference between the English and the American figures is, of course, partly accounted for by the fact that in America children not under proper guardianship and in moral danger are placed under probation officers, while this practice does not exist in England.<sup>1</sup>

In India probation has been introduced but can hardly be said to have taken root. The Indian Jails Committee (1919-1920), in their report exhaustively dealt with probation under the head 'measures for prevention of committal to prison'. Comparing the position in this country with that obtaining in the United States, they laid great emphasis on the quasi-parental position which the courts should occupy

<sup>1</sup> Sir William Clarke Hall, *Children's Courts*.

in relation to child-offenders, and they recommended the adoption of the Children Act of 1908 throughout India, the provision of Remand Homes, Children's Courts, Probation Officers (together with release on probation), Certified Schools and special Institutions for defective children. Speaking of Reformatory Schools in India under the Reformatory Schools Acts, 1897, they commented upon the fact that they were too apt to approximate to juvenile jails rather than to real Schools ; they were large centralised buildings, without any attempt to reproduce the features of home life, or to provide for female care, which was essential for child life. At the present day the general position has somewhat improved but in all essentials there is a great deal yet to be done. The difficulty arises mainly, from the absence of voluntary endeavour and of legislative enactment. There was until lately no Probation Act in India, and no Probation System, properly speaking. Occasionally, action is taken under Section 562 of the Code of Criminal Procedure which I have already referred to. The figures show that the total number of probation officers in Bengal, Bombay, Madras, and the Punjab is altogether about two or three dozen, and that there are few probation officers in the other provinces. It is refreshing to find that the United Provinces has lately been paying much attention to this most important question. In 1933 young offenders placed on probation totalled 124 in Bengal, and 514 in Madras, as against 5,358 offenders under 21 sent to prison in Bengal, and 1933 sent to prison in Madras. The figures as to offenders under 21, sent to prison in the other provinces approximates 3,000. From the above it will be quite clear that there is hardly any serious effort to cope with criminality among young persons in India. Not until the scheme of the Criminal Justice Act of 1925, which I have briefly described, is adopted and carried out in all the Provinces, can the enormous number of young criminals, or potential criminals, be adequately dealt with. The Children Act in Madras, Bombay and Bengal as well as the Immoral Traffic Act in Bengal and one or two other similar enactments in other provinces have made a beginning, but their working must be reinforced by voluntary societies, as also by an adequate number of Juvenile Courts, which we shall presently proceed to consider.

The future of probation in this as well as in any other country is bound up with four factors: First, its extension, or judicious adaptation to adults ; secondly, the training of a specially selected class of men and women with aptitude and equipment for the work and with a true sense of the responsibility which the care of young persons imposes ; thirdly, a well organised system of co-operation between salaried officers and voluntary officers, or voluntary societies ; fourthly, restriction of the sphere of each officer's work to a requisite

number of delinquents, so as to admit of individual and intensive treatment of each delinquent placed in his charge ; and, last but not the least, a thorough and skilled overhead supervision. These being secured probation will amply justify itself, as one of the potent factors of social defence.

### JUVENILE COURTS.

Section 45 of the Children and Young Persons' Act, 1933, sets forth the constitution of Juvenile Courts: Any justice or justices of the peace, or other magistrate by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under those Acts, or by virtue of his commission, or under the common law, and sitting for the purpose of hearing any charge against the child or young person, or for the purpose of exercising any other jurisdiction conferred on Juvenile Courts by or under the Act of 1933, or any other Act, shall be known as Juvenile Courts. Outside the metropolitan police court area, and the City of London, a panel of justices specially qualified for dealing with juvenile cases shall be formed in every petty Sessional division, and no justice shall be qualified to sit as a member of the Juvenile Court, unless he is a member of such a panel. There may be only one panel for any two or more petty sessional divisions. Rules for formation of panels and for periodical revision of panels of justices may be framed by the Lord Chancellor. It will be observed that the constitution of Juvenile Courts and their jurisdiction, and the constitution of probation areas, and the jurisdiction of probation committees and probation officers, are governed, by rules running on parallel lines. Apart from these questions of jurisdiction, the main feature of Juvenile Courts which we must pause to consider is its freedom from traditional legal forms of procedure or the usual pomp and circumstance associated with a Court of Justice.

The first Act which established juvenile courts in England was the Children Act of 1908, whereby the obligation to try young offenders apart from the ordinary police court, was imposed by a clause that ran as follows: "A Court of Summary Jurisdiction when hearing charges against children or young persons,.....shall.....sit either in a different building, or room, from that in which the ordinary sittings of the Court are held, or on different days, or at different times, from those at which the ordinary sittings are held, and a Court of Summary Jurisdiction so sitting is in this act referred to as a Juvenile Court". Nothing in later legislation has altered this necessary quality of the juvenile Court, namely, that it should have no

savour of the ordinary Court atmosphere, or magisterial severity. The practice in the United States is fundamentally different. There "the Juvenile Court is not a tribunal for trial of children who have committed offences ; it is a Court of Chancery, where the State assumes duties which parents are unable or unwilling to fulfil. It starts out on the theory that the child of proper age to be under jurisdiction of the Juvenile Court is encircled by the arm of the State, which, as a sheltering wise parent assumes guardianship, and has power to shield the child from the rigour of common law, from neglect, or depravity of adults".<sup>1</sup> Or, as another writer has phrased it, "the Court becomes a concrete expression of the State's obligation to the child ; a recognition that the child is in court as the result of conditions not of his own making, and that he has a valid claim against the State, and is to be saved to it, not punished by it".<sup>2</sup> In other words we have there the full grown idea of State tutelage. In that view it is important that all means should be taken to prevent the child and his parents from forming the conception that the child is being tried for a crime.

In the Scandinavian countries the treatment accorded to juvenile delinquents has even less savour of penal procedure. They are dealt with by Child Welfare Councils, which do not include a member of the judiciary or the magistracy. In Sweden, for instance, the Child Welfare Council consists of a member of the poor relief administration of the commune, a clergyman, a teacher or school inspector, other persons interested in the welfare of children and young persons, and, where available, the provincial or municipal medical officer. The necessary factor which attracts the operation of Child Welfare Law is not so much the offence committed as the existence of circumstances calling for the interference of the Child Welfare Council in the interest of public safety. As a corollary to the principle of State tutelage the Courts in the United States and in the Scandinavian Courts have greater powers over the children brought before them. If necessary, the control of the Courts might extend over the children during the whole period of their minority. In Norway, the authority of the Child Welfare Council can, under the present law, extend up to the completion of their twenty-first year. In Denmark the age is eighteen or twenty-one according to circumstances. There can be no doubt that such a system can operate successfully, only if there be organised public effort in the country, and if the personnel of the public bodies be beyond all cavil. One of the greatest English authorities on the subject, Sir William Clark Hall, questions the wisdom of bringing

<sup>1</sup> Miriam Van Waters, *Youth in Conflict*, p. 9—quoted in English Juvenile Courts by Winifred A. Elwin. • Kegan Paul.

<sup>2</sup> Flexner and Baldwin, *Juvenile Courts and Probation*, p. 8.



delinquent children before any other than properly constituted criminal Courts. He observes:

“The real truth, however, is—and it is a truth which the legislature will some day realise—that no simplification of procedure, no regulations for the ‘trial’ of children, however perfect in themselves, reach down to the root of the matter. As long as we continue to conceive of the child as a ‘criminal’ and merely to admit such modifications of his criminality as are due to youth, so long shall we fail to provide the most fitting cure for his misdeeds. What is needed is not the dramatic staging of a trial for a crime, but the provision of the best means for ascertaining and remedying evil tendencies. Whilst I am convinced, on the one hand, that our present system is wrong, I am not as yet convinced that a purely chancery jurisdiction is the best alternative.”<sup>1</sup>

The work of juvenile Courts in Canada appears to be conducted on a large and organised basis. The report of the Toronto Juvenile Court furnishes a sample. A staff of officials, far more complete than most Children’s Courts in England have at their disposal, accomplished in Toronto as far back as 1928 the task of dealing with some 2,538 juvenile offenders, and 223 neglected waifs. The staff consisted, in addition to the judge, of a psychiatrist, a consultant, a woman social investigator, a chief probation officer with four assistants (one of them a woman) besides five clerical officers. As regards the sentences passed, by far the major number of cases (2,027) were adjourned *sine die* and no conviction at all was registered against them. This method, as Judge Mott observes, makes the statistics of recidivism less reliable, but “the child’s good name is of more importance”. Of the remainder some have their sentences suspended, and are placed under probation, in the care of a Big Brother or Big Sister, and some, upon their undertaking to behave themselves, are allowed to leave the Court to work out their own salvation, while others are left under the temporary or permanent supervision of a Children’s Aid Society. A few are sent to an Industrial School as a last resort.

The above account of Children’s Courts in other countries shows how juvenile criminality is engaging increasing attention. The most efficient means of reducing crimes, is to attack them at their inception, among juveniles, and that not by sentencing them to imprisonment or any other form of punishment on a retaliatory basis, but by adopting measures of safety such as those above described. The fact that in such a vast continent as India there are only a few juvenile Courts, and those, poorly equipped, with a few probation officers, points to an immense scope for reformatory and legislative work before us.

<sup>1</sup> *Children’s Courts*, p. 64—Geo. Allen & Unwin Ltd.

## LECTURE X

### MEASURES AGAINST ADOLESCENT CRIMINALITY.

#### INDETERMINATE SENTENCE.

Individualization and internal reformation began in the West with children. They were then extended to adolescents. Finally, it occurred to penalists that the same methods with necessary modifications might profitably be extended to most adults. With the gradual passing of the retributive idea of punishments, the intensity of the deterrent idea began to lose its hold on the reflective mind. There is an intimate connection between the idea of retribution and that of deterrence. Most often it is only ostensibly the deterrent idea, but there lies wrapped up in it the idea of retribution in greater or lesser measure.

The first manifestation of the loosening of the idea of retribution and deterrence, on the one hand, and the strengthening of the idea of individualization and reformation, on the other, came in the form of protest against fixed sentences of imprisonment. The principle on which such protest was based was not quite unknown. It is: that the delinquent's destiny should be placed, measurably, in his own hands; that he should be enabled to better his own condition and thus to effect his own liberation; and that for this purpose his sentiment of self-respect should be awakened, and care should be taken to instil in his mind hope instead of fear. Under a system in which punishment is a fixed term of imprisonment, such a scheme is obviously frustrated. No betterment on the part of the delinquent would bring him material advantage and, therefore, effort in that direction would lack the necessary incentive. In order to put him in the mood for bettering himself, and to inspire in him the hope of freedom, what is most essential is to do away with the system of fixed sentences. In other words, the sentence must be indeterminate.

This idea was gradually forcing itself on the minds of practical penalists all over Europe and America in the nineteenth century, and it gained in definiteness towards the latter half of it.

#### SOME EARLY ENDEAVOURS.

Dr. Frederick Howard Wines records, among others, the interesting case of Colonel Montesinos of Spain who, in 1835, was Governor of the Valencia prison which contained from 1,000 to 1,500 convicts. He organized it on the military system dividing the population into

companies and appointing selected prisoners as inferior company officers. He utilised humanising agencies such as teaching them trades, and impressing on them the dignity of labour. By his personal influence and the confidence he reposed in them, he changed the whole mental outlook of the prison. But the real secret of his success lay, as he thought, in the fact that under his system the prisoners could, by bettering themselves, reduce their term of sentence by one-third. This little lever, which he put in the hands of the prisoners, enabled them to lift themselves out of the slough of despond into which they had fallen and to put forth their best efforts to deserve the remission offered by good behaviour. The result was, that the number of relapses to crime fell to a phenomenally low figure. Subsequently, however, the law intervened, and definitely laid down that all prisoners must serve out their full term. This proved fatal to further reform and the scheme fell through. Montesinos resigned, and wrote in 1846 as follows:—

What neither severity of punishments, nor constancy in inflicting them can secure, the slightest personal interest will obtain. In different ways, therefore, during my command I have applied this powerful stimulant. \* \* \* The maxim should be constant and of universal application in such places, not to degrade further those who come to them already degraded by their crimes. Self-respect is one of the most powerful sentiments of the human mind, since it is the most personal; and he who will not condescend, in some degree, according to circumstances, to flattery of it, will never attain his object by any amount of chastisement; the effect of ill-treatment being to irritate rather than to correct, and thus turn from reform instead of attracting to it.

Another striking instance, cited by Dr. Wines, is that of Obermaier, Governor of the prison at Kaiserslautern in Bavaria in 1830. In 1842 he was transferred to Munich, to be in charge of a big prison holding 700 prisoners in a state of riotous insubordination. In both places, by inspiring confidence and hope and awakening self-respect, he achieved wonderful results. But there, again, the real secret of his success lay in the fact that under the law in Bavaria then in vogue there was no fixed term of imprisonment. He was, therefore, in a position to impress upon the minds of the prisoners the fact that their destiny was in their own hands, and it was for them to work out their freedom. Added to the advantage he derived from the law, he had also the help of Prisoner's Aid Societies for exercising supervision over the released prisoners in their newly acquired state of freedom.

A full-limbed scheme of Prison Reform is found in a memorable discourse by M. Bonneville de Marsangy, delivered at the opening of the Civil Tribunal of Rheims, in 1846 on 'preparatory liberation',

in which he dealt with the power of pardon, and of conditional liberation, of police surveillance, of aid to discharged prisoners, and of the advantages of patronage in connection with the question of enduring reformation. This is how he puts it:

Society should say to the prisoner: 'Whenever you give satisfactory evidence of your genuine reformation, you will be tested under the operation of a ticket-of-leave; thus the opportunity to abridge the term of your imprisonment is placed in your own hands'. \* \* \* As a skilful physician gives or withholds remedial treatment according as the patient is or is not cured, so ought the expiatory treatment imposed by law upon the criminal to cease when his amendment is complete; further, detention is inoperative for good, an act of inhumanity, and a needless burden to the State.

Here is a definite enunciation of the principle of Indeterminate Sentence. Bonneville was not oblivious of the fact that other factors were also necessary in order that the fullest advantage might be obtained from the operation of this principle. These other factors are, according to him, moral encouragement, proper discipline, education such as may help the prisoner to improve his social and economic position, etc.

Nor must we omit from consideration the Irish Prison System under the inspiring influence of Sir Walter Crofton which at or about that time opened a new chapter in the history and methods of reformatory prison discipline.

With all these ideas in the air, a few notable publicists in America set to work to organize a new system of reformatory prison discipline. They were all advocates of the Irish system, and were prepared to adopt whatever good they could derive from it in conformity with local conditions. These practical penalists were Dr. E. C. Wines, Secretary of the New York Prison Association, Dr. Theodore Dwight of New York, Mr. F. B. Sanborn of Boston, and Mr. Z. R. Brockway, then of Detroit, but later of Elmira. Messrs. Wines and Dwight in 1867, made a report to the legislature of New York in which they set out their views on prisons and reformatories of the United States and Canada, and in which may be found within a small compass the principle on which the Elmira Reformatory, soon to be started, was based. It shows how greatly they were impressed by the excellence of the Irish system. They observe:

We have no hesitation in expressing the opinion that what is known and has become famous as the Irish System of convict prisons is, upon the whole the best model of which we have any knowledge, and it has stood the test of experience in yielding the most abundant, as well as the best fruits. We believe that in its broad general principles—not certainly in all its details—it may be applied, with entire effect, in our own country, and in our own

State. What then is the Irish System? In one word, it may be defined as an adult reformatory, where the object is to teach and train the prisoner in such a manner that, on his discharge, he may be able to resist temptation, and inclined to lead an upright, worthy life. Reformation, in other words, is made the actual as well as the declared object. This is done by placing the prisoner's fate, as far as possible, in his own hands, by enabling him, through industry and good conduct, to raise himself step by step to a position of less restraint; while idleness and bad conduct, on the other hand, keep him in a state of coercion and restraint<sup>1</sup>.

A more uncompromising statement on the efficacy of Indeterminate Sentence is to be found in Mr. Brockway's paper in the following year in connection with the twenty-fourth annual report of the New York Prison Association, in which he says:

The whole question of Prison Sentences is, in our judgment, one which requires careful revision. Not a few of the best minds in Europe and America have, by their investigations and reflections, reached the conclusion that time sentences are wrong in principle; that they should be abandoned, and that reformation sentences should be substituted in their place<sup>2</sup>.

#### THE ELMIRA REFORMATORY.

It was with this object that the Elmira Reformatory was founded. The Act establishing it was passed in 1869, but the Reformatory was actually opened later on in 1876, when it became ready for the reception of prisoners. The first inmates were supplied from the State prison at Auburn. The picturesque situation, as well as the architectural design and structure of Elmira Reformatory are all that could be desired; but what we are concerned with are not those external features, nor the details of internal arrangement. What is essential is the main scheme of reform, and how it is sought to be carried out. The institution is limited to males of the age of 16 to 30, who are first offenders, *i.e.*, individuals in regard to whom successful reform may be anticipated. In exceptional cases relapsed criminals are admitted but only if they are likely to answer the purpose of the institution. The clause in the law relating thereto runs thus: "That the individuals of the age of 16 and 30 years, who are not known to have been previously sentenced to a State prison either in this or any other country, can be sent to the Elmira Institution on conviction of a criminal act, by any Court of justice in the State". From the Court of justice the convict is simply handed over to Elmira where, without regard to sentence, or to the length, nature, or mode of punishment, he is treated according to the rules of the establishment.

<sup>1</sup> Wines, *Punishment and Reformation*, p. 203.

<sup>2</sup> *Ibid*, p. 203.

The clause relating to the possible length of his stay at the institution provides "that the length of time of such a convicted and legally sentenced individual is to be decided by the Managers of the Reformatory ; but such imprisonment shall not exceed the longest term of punishment provided by law for the particular criminal case for which the individual has been convicted and sentenced." The administration and control is placed in the hands of the Board of Managers and a General Superintendent. The former consists of five persons chosen from the public by the State Governor and the Senate, for a period of five years, receiving no pecuniary reward for their services. Besides looking after the details of management, the Board has to discharge the important duty of considering cases for liberation on parole. As soon as an inmate has satisfied the necessary conditions, and is deemed to be fit for enjoying conditional freedom, his case comes up before the Board for liberation on parole. It has to be gone into with great care, and granted only if it is regarded as good for him, and good for the community. The practical control of the institution rests in the hands of the General Superintendent. The discharge of the prisoner from the institution in the first instance, on parole, that is to say on word of honour, is only conditional ; it is not until he passes six months in satisfactory conduct that he can be deemed to have deserved complete liberation. During these six months of parole he is required to submit monthly to the institution a report, attested by some reliable person such as his employer, his parish clergyman, or a well-known man of character. The paroled men are continually kept under the supervision of another officer of the institution called the Transfer Officer, whose duty it is to keep watch and, as soon as they deviate from the right path, to have them arrested and brought back to the institution. The education imparted in the institution is of an all round character. On the principle of *mens sana in corpore sano*, physical, intellectual, moral, and industrial training goes on together according to approved scientific methods. It is by no means a comfortable life, but a hard life of discipline, which the inmates are called upon to go through. The inmates in the initial stage of their training are often known to have longed for a transfer to the ordinary prison, so great is the pressure of duty and discipline cast upon them under the rules. But the personality of Mr. Brockway, his intimate contact with each inmate, his knowledge of human character, and his practical wisdom and sagacity have made it possible for the institution to achieve wonderful results in the case of an overwhelming majority of the persons in his charge. In due course they begin to realise that it is all for their good, and before many months have passed their side-tracked minds begin to run on proper lines and make for their own betterment. The average

period within which the institution ordinarily expects reform is a minimum of fourteen months and a maximum of twenty-four months.

#### DIFFERENT TYPES OF INDETERMINATE SENTENCE.

There are various forms which Indeterminate Sentence has assumed in the United States. In New York itself, three different types are in vogue. The first type is as described above, *i.e.*, the one in Elmira Reformatory where, it will be noted, the maximum period of detention is that laid down in the Penal Code for the particular offence committed by the inmate, but no minimum is prescribed. The Board of Management has full discretion to release him at any time it deems fit. In practice, however, it is found that at least a little over a year's training is necessary before any one can with safety be released on parole. Following upon Elmira Reformatory the principle of Indeterminate Sentence came to be applied in State prisons in New York as a permissive measure in 1889. This furnishes a second type. A law was passed whereby a maximum as well as a minimum was fixed, the maximum being the period fixed for each offence under the existing statute, and the minimum being one year applicable to all offences. The judges were given the discretion to determine within these limits their own minimum and maximum for each offender. In practice, however, it was found that the judges fixed the maximum and the minimum so close to each other that there was hardly anything indeterminate about the sentence. For instance, if the maximum fixed was ten years, the minimum was fixed at nine years and six months, so that it really amounted to a fixed sentence. This led to an amendment which laid down that a minimum sentence should not be more than half the maximum. The third type of Indeterminate sentence in New York State is based upon a law of 1915, which relates to persons sentenced to imprisonment in any penitentiary reformatory or workhouse in New York City. In the case of the penitentiary and reformatory there is a general maximum fixed for all offences, namely three years, whereas in the case of the workhouse the general maximum is fixed at two years. The Parole Commission has absolute discretion to release a prisoner but always with the approval of the committing judge. The name Elmira now stands for the system of Indeterminate Sentence with its attendant reformatory machinery. Varying in details, but in one form or another, the Elmira System came to be adopted in several other States: in Massachusetts, Pennsylvania, Ohio, Michigan, Illinois, Minnesota, Kansas, Indiana, California, South Dakota and so on, till about thirty-seven of the States under the Union have now accepted the principle.

## BASIS OF THE SYSTEM OF INDETERMINATE SENTENCE.

There are two aspects from which Indeterminate sentence may be viewed. These may be called its negative and affirmative aspects. In the former, it is seen merely as a sentence of imprisonment, the period of which being undetermined is capable of indefinite prolongation. In this respect, its genesis may be traced to the days of the Inquisition, when anyone might be ordered to be imprisoned for such time as seemed expedient to the Church. At the present day its parallel is found in deportation in some countries whereby the deportee is sent off to an unknown destination to be there detained 'during His Majesty's pleasure'; or in the case of the criminal lunatic, whose period of detention is phrased in similar terms of indeterminateness. These methods are indeterminate in the sense that they render the period capable of indefinite prolongation. On the other hand, there is the positive aspect, with which we are directly concerned, and which makes Indeterminate Sentence an advanced and scientific method of reforming the individual delinquent, and, consequently, of ensuring social safety in the long run. This positive aspect rests, as already observed, on placing the key to his own salvation in the hands of the individual offender. It lets the offender himself determine the period of sentence by availing himself of the opportunities for correction (and, therefore, for release) placed before him. The sooner he gives evidence of change of mentality the earlier does he earn his freedom. The view that definite sentences are unscientific rests on the recognition of the fact that no judge while passing the sentence can, under the present law of evidence, be aware of the antecedents of the offender, his heredity, his physical or psychical history, his associations and social environments, or his capabilities of reformation. Much less can he estimate the effect which the punishment of imprisonment will have on the prisoner, or anticipate the moment when he may deserve release as a law-abiding citizen. All these data which are beyond his access at the moment of judgment, may, however, come to light *after the sentence*, and during his incarceration, provided there exists the proper machinery for investigation and sympathetic observation. Thus though judicial individualization may fail, administrative individualization, after sentence, may successfully function, given the requisite conditions. The treatment may then be adjusted to the personality of the offender, and the possibilities of reforming him. Hence the need for introducing a system allowing elasticity as to the period of sentence, and as to the rigour with which it is executed, so that an offender may not have to be detained a day after he reaches a state of fitness for release, nor be let loose upon society unless and until he reaches that state.



Looked at from this positive point of view, the system of Indeterminate Sentence has been regarded as in a manner the descendant of the Mark System, with the Ticket-of-leave, adopted by Captain Alexander Maconochie in Norfolk Island in the days when the system of transportation obtained, and of the later so-called Progressive System, or Irish Intermediate System, associated with the name of Sir Walter Crofton. In certain respects, it has an affinity with the so called 'Good Time Laws', which prevailed in some parts of the United States from the first quarter of the nineteenth century onwards before the fame of the Irish System travelled to America. The general principle of the 'Good Time Laws' was, that the prison board was authorised to release the offender in less time than the sentence of imprisonment passed by the Court, if in the opinion of the board, he had maintained good conduct in prison. The prison board, as the administrative authority could determine whether the prisoner had earned the reduction in sentence, but it was the legislature that made the schedule of reduction in time. In all these, however, underneath the resemblance on the surface, there is a radical difference in as much as they are all cases of fixed sentences, the period of which may be shortened by the operation of administrative rules, somewhat mechanical in their application. Sir Evelyn Ruggles-Brise thus sums up the defects of the Ticket-of-leave system:

The Ticket-of-leave system affords no solution of fixed sentences, and in no sense is a substitution of a labour for a time sentence. All it does is to tell a man that if he does not forfeit marks his sentence will be, say, three years nine months instead of the five to which he was sentenced. It remains a fixed sentence, and in practice *the* sentence, for the great majority of convicts earn full marks by a more or less mechanical process. Abstention from acts contrary to discipline and from overt idleness will secure him full remission. Again, it is almost impossible to make the 'Mark System' a true index of labour. It is a task almost beyond human competence to assess marks according to labour. No one is to blame for the fact that from necessities of the case a mark system is almost bound to degenerate into a formality, a good and useful formality, and of great influence in convict prisons to-day, but its virtue is not positive. A man only has to keep out of trouble to earn a full remission. It is giving the old mark system a very high place in the category of those things that serve to solve the prison problem to say that it is in effect the substitution of a 'labour' for a 'time' sentence<sup>1</sup>.

As against the negative value of the Mark system, or the Ticket-of-leave system, the positive value of Indeterminate Sentence has to be kept prominently in view, and it consists in concentrating on the

<sup>1</sup> *Prison Reform at Home and Abroad*, p. 30.

personality of the offender, and enabling him gradually to develop the best that is in him by firmness combined with encouragement and kindness, together with hard discipline and instruction. The system of marking may, or may not, be one of the instruments employed in the general programme of that training. The most potent of all the instruments for rehabilitating the offender is found in the indefiniteness of the period of sentence, and in the power given to the delinquent to determine the sentence by satisfying the administrative authorities as to his fitness for release. The *rationale* of reform rests not on deterrence, not on the fear implanted by the old prison regime, but on hope, which the system of Indeterminate Sentence is bound to awaken in the offender. This is the strongest claim which is put forward by advocates of the system for its universal acceptance.

The reason why penologists are still divided in opinion on this measure is that the system, as practised in the United States, has lent itself to diversities of form. Owing to the absence of reliable statistics it is difficult to estimate the value and utility of these different forms. The application of Indeterminate Sentence to persons up to the age of 35 in some of the American States is also somewhat responsible for difference of opinion on these details. There is a growing conviction that as a means of individualization and reformation of the offender and, therefore, as a superior measure of social defence, a cautious and discriminating application of the principle offers infinite advantages.

In certain quarters it is regarded as a measure void of all utility owing to the results of wrong application. It calls for insight and personality in the Superintendent who is to handle this weapon. Wrongly handled, the result must be disappointing. As Dr. Wines observes:

It is merely a tool. It is of no value, if not used, or in the hand of a man who does not know how to use it. It has in itself no reformatory power; it is a dead thing. The real power is in the reformatory agencies which have been made—labour, education, and religion. These, if applied, will produce the same effect under a definite as under an indefinite sentence; the difference is that, under the latter, the prisoner ceases to resist their application, and may even be induced to apply them to himself. It puts himself in the most favourable attitude to be operated upon, in the condition most favourable to a cure.

The literature<sup>1</sup> on the reformative methods, which are usually adopted in America, for carrying out the system of Indeterminate

<sup>1</sup> The reader is referred to *Fifty Years of Prison Service* (Charities Publication Committee, New York, 1912), by Zebulon R. Brockway, pp. 161-386; *Punishment and Reformation*, by Dr. Frederick Howard Wines, Chap. IX, pp. 190-8, and Chap. X, pp. 199-234; *Prison Reform at Home and Abroad*,

Sentence is abundant. So I do not propose in these lectures to enter into those details. The first International recognition of the principle of Indeterminate Sentence was at the Cincinnati Congress, where the eighth item in the Declaration of Principles ran as follows: "Peremptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time." Later, at the Sixth International Prison Congress of 1900 at Bruxelles, it met with a hostile reception. In 1910, however, at the Washington Congress a resolution in favour of it, as a punishment for grave crime, was carried unanimously by delegates representing most of the countries of Europe and of the civilized world. It affirmed the value of the principle for reformatory purposes, and restricted its application to moral and mental defectives.<sup>1</sup>

At the Ninth International Prison Congress held in London in 1925, no less a person than Lord Cave delivered an address on Indeterminate Sentence. Dealing with the various aspects of the question he formulated his conclusions in the form of a few searching questions. Coming as they do from such a high judicial authority as Lord Cave, they are deserving of serious consideration:

Our people still regard the criminal not as an unfortunate invalid, who should be subjected to curative methods, but as an offender against the public good; and the idea of punishment as an element of the penal law is not obsolete in this country. Further, statistics showing the result of the American system are still hard to obtain, and those which are available are not too encouraging. In these circumstances, I can only appeal to our American friends to give us the documented results of their own experience so soon as an opportunity occurs; and in the meanwhile I would put certain questions which appear to me to call for an answer:—

1. Should the Indeterminate Sentence be reserved for recidivists, or for grave offenders; or should it be applicable in the case of a recurrence of less serious offences? I think that the former is the true view, and that petty offenders should not be subject to a prolonged sentence, except in cases where their conduct is proof of mental defect.

2. Up to what age should the Courts be authorised to impose the Indeterminate Sentence? It would appear to me that the age of 35, which is adopted in some American States, is too high, and

by Sir Evelyn Ruggles-Brise, pp. 29-32, pp. 89-99, and pp. 159-65; *Criminology*, by Edwin H. Sutherland pp. 510-22; *Penology in the United States*, by Dr. Louis N. Robinson, Chap. VIII, pp. 130-52, pp. 220-6; '*Le Systeme des sentences indeterminées*' in *Revue de Droit pénal et de Criminologie* of November, 1926; Address by Lord Cave in *Proceedings of the Ninth International Penitentiary Congress of 1925*, pp. 259-67; *The New York State Reformatory in Elmira* by Alexander Winter F. S. S. Swan Sonnerschein, 1891.

<sup>1</sup> Ruggles-Brise, *Prison Reform At Home and Abroad*, p. 162. See also Ruggles-Brise, *The English Prison System*, p. 55.

that (at all events in the first instance) the sentence should be limited to persons of not more than 25 or (at the most) 30 years of age. The system is not appropriate to old offenders who are beyond the possibility of cure.

3. Assuming that a maximum period of confinement should be fixed by Statute, should the Statute or the sentence also impose a minimum term? For myself, I incline to answer this question in the negative. A minimum sentence is apt to be regarded as the real and operative sentence, so that any detention beyond this term is regarded as a grievance; and in this way the whole advantage of the system is in danger of being lost.

4. The authority which is to grant release requires to be carefully defined. Should it be the Prison Commission, the Prison Governor, or some authority independent of both; and if so, what should be its nature? I incline to the view that the best authority would be a small body of experienced persons appointed for the whole country and giving their whole time to the work; for only from such a body can uniform and skilled methods of administration be expected.<sup>1</sup>

#### PAROLE: CONDITIONAL RELEASE.

An invariable concomitant of the system of Indeterminate Sentence is the system of Parole. It is regarded in the United States as a potent factor in its success. There are two principles underlying it: first, in the interests of society it is recognised that not even the best informed person or body of persons can be expected to make an unfailing diagnosis of the prisoner's condition, and to decide upon the exact moment when he may be safely given absolute freedom. It is, therefore, thought expedient that he should not be released straightway unconditionally, but that between his imprisonment and complete liberation, he should be placed in a state of modified freedom, such as will enable the authorities to judge of his capacity to use his freedom properly when the time may arrive for his discharge; and upon being so satisfied finally to restore him to full rights of citizenship. So far from the point of view of defence of society. Secondly, for the welfare of the individual released, it is felt that a tentative period spent in a condition of relaxed restraint gives him an opportunity to realise his sense of responsibility, and freedom, and to develop initiative. Prison life is essentially a life of routine and discipline, and there is very little scope in it for exercise of initiative. The consensus of expert opinion is in favour of the view that before the newly discharged person is thrown upon the outside world, he should be given a little time and opportunity to build up, or, if he has still something of it lying dormant, to awaken, such self-esteem and power of self-help as may be

<sup>1</sup> *Proceedings of the IXth International Penitentiary Congress*, pp. 259-267. at pp. 265-266.

essential to steer him through the struggles and temptations that beset life. Thus Parole tries to bridge the gap between prison and freedom. This purpose is effected through the Parole Board and the staff of officers working under it, who are generally known as Parole Officers. The Parole Officer seeks to re-introduce the criminal to freedom by degrees, supervising the programme of work of the parolee, taking a personal interest in his welfare, helping him find a job, securing fair treatment from his employer, and otherwise giving him sound advice and guidance. Apart from doing all this he also represents a threat, the threat namely, that he will be returned to prison without a trial if he does not live up to the laws of society and is guilty of violating the terms of parole. Parole has, therefore, been defined as, "the act of releasing, or the status of being released, from a penal or reformatory institution, in which one has served a part of his sentence, on condition of maintaining good behaviour, and remaining in the custody and under the supervision of the institution, or some other agency approved by the State, until a final discharge is granted."<sup>1</sup> It will be clear that, considered in the strict sense of measures of safety being substituted for punishment, parole does not satisfy the essential requirements. Unlike probation, employed in cases where no sentence is passed, or where having been passed its execution is suspended, parole presupposes not only the imposition of a sentence but the serving of it for a partial period. It cannot, therefore, and does not, in fact, take the place of punishment, yet in the larger sense of *défense sociale*, it must be regarded as a measure of safety in so far as it aims at putting the criminal on his own legs as a law-abiding citizen. Stanford Bates, Director of the United States Bureau of Prisons, states that a large percentage of those released on parole succeed in living a life free from further crime, and that in some places parole has been ninety per cent successful.

The equipment and qualifications of the Parole Officer are very nearly the same as those of the Probation Officer. Excess of supervision, as much as excess of relaxation is bound to tell on the results of probation and parole alike. The whole problem is one of personality of the officer concerned, and its reaction on the dormant personality of the offender. In actual practice, however, the technique of the parole system is not so superior as that of probation.

#### PREVENTIVE DETENTION.

Though parole in the United States is found invariably in association with Indeterminate Sentence, it has no necessary connection with

<sup>1</sup> Sutherland, *Criminology*, p. 523.

it. It may equally be serviceable when employed in the case of prisoners under definite sentence. This is the form in which parole is found in England, in association with the system of preventive detention, under the Prevention of Crime Act, 1908, Part II (Edw. VII C. 59). The Act provides that where a person is convicted on indictment of a felony, committed after the passing of the Act, and subsequently the offender admits that he is, or is found by the jury to be, an habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion, that by reason of his criminal habits, and mode of life, it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence, ordering that on the determination of the sentence of penal servitude, he be detained for such period not exceeding ten, nor less than five, years as the Court may determine (Sec. 10, sub-sec. 1). For the purpose of defining habitual criminal within the meaning of the Statute, it is laid down that a person shall not be found to be an habitual criminal unless the jury finds on evidence, (a) that since attaining the age of sixteen years, he has, at least three times previously to the conviction of the felony charged, been convicted of a felony, whether any such previous conviction was before or after the passing of the Act, and that he is leading persistently a dishonest or criminal life ; or (b) that he has on such a previous conviction been found to be an habitual criminal, and sentenced to preventive detention (sub-section 2). The sentence of preventive detention takes effect immediately on the determination of the sentence of penal servitude, whether the sentence is determined by effluxion of time or by the order of the Secretary of State at such earlier date as the Secretary of State may direct [Sec. 13, sub-section (1)]. Conditional release is provided for in the next section (Sec. 14), which lays down that the Secretary of State shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, take into consideration the condition, history, and circumstances of that person with a view to determining whether he shall be placed on licence, and, if so, on what conditions—[sub-section (1)]. The Secretary of State may at any time discharge on licence a person undergoing preventive detention, if satisfied that there is a reasonable probability that he will abstain from crime, and lead a useful and industrious life, or that he is no longer capable of engaging in crime, or that for any other reason it is desirable to release him from confinement in prison (sub-section 2). A person so discharged on licence may be discharged on probation, and on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case, or on such other conditions

as may be specified in the licence (sub-sec. 3). The Directors of Convict Prisons are enjoined to report periodically to the Secretary of State on the conduct and industry of persons undergoing preventive detention, and on their prospects and probable behaviour on release, and for this purpose the Act provides that they shall be assisted by a committee at each prison in which such persons are detained, consisting of such members of the board of visitors, and such other persons of either sex, as the Secretary of State may from time to time appoint (sub-sec. 4). It is also provided that every such committee shall hold meetings, at such intervals of not more than six months as may be prescribed, for the purpose of personally interviewing persons undergoing preventive detention in the prison and preparing reports embodying such information respecting them as may be necessary for the assistance of the Directors and may at any other time hold such other meeting and make such special report respecting particular cases as they may think necessary (sub-sec. 5).

The law and the institutions concerning preventive detention have to deal with an entirely different kind of material from that which has engaged our attention during the last two lectures. The juvenile and adolescent offenders are malleable metal upon whom constructive measures of social defence are more likely to succeed. The subjects of preventive detention, on the other hand, are the worst and most dangerous class in the community, the recidivists. They have already undergone long terms of imprisonment, and in some cases have become inured to prison life. The wisdom of imposing a further sentence upon these hardened convicts of five, seven or ten years, which is to come into operation after the expiration of their substantive term of sentence almost automatically, has been seriously doubted. In going into that question we shall presently discover that though the type of criminal to whom preventive detention will apply is quite different from the juvenile or the adolescent criminal, he raises, in substance though not in form, the same question of determinateness or indeterminateness of sentence. Indeed, there is not one problem of penology which has no repercussion on another.

The object of preventive detention was, as the memorandum explaining the Bill clearly stated, that in the case of confirmed recidivists a sentence of imprisonment had neither a deterrent nor a reformatory effect and, in the interest of society, the only thing that could be done was to segregate them from society for a long time. It might not be necessary, during that period of time, that their punishment should be a severe one. All that was wanted was that they should be under discipline and compulsorily segregated from the outside world. The then Secretary of State, Mr. Churchill, in laying before Parliament the rules for carrying out the Act, and quoting

Lord Gladstone, stated that the Act was meant for "the persistent dangerous criminals", that it was not to be applied to persons who were "a nuisance rather than a danger to society" or to the "much larger class of those who were partly vagrants, partly criminals, and who were to a large extent mentally deficient". Who then were exactly the persons whom the Act sought to keep in segregation? It was not the mere 'habituals' but the 'professionals' that the Act contemplated:

Habituals were men who drop into crime from their surroundings or physical disability, or mental deficiency, rather than from any active intention to plunder their fellow creatures or from being criminals for the sake of crime. The professionals were the men with an object, sound in mind—so far as a criminal could be sound in mind and in body, competent, often highly skilled, and who deliberately, with their eyes open, preferred a life of crime, and knew all the tricks and turns and manoeuvres necessary for that life. It was with that class that the Bill would deal.<sup>1</sup>

It seems, however, doubtful that a system which starts out on the avowed basis that the criminal is there only for the purpose of segregation can ever produce any other result than the one contemplated. There is a strong body of informed opinion which holds that it is neither expedient, nor consonant with sound principles of penology, to inflict long and fixed periods of preventive detention on criminals even of the so-called 'professional' type, who are adjudged to be proper subjects, only with reference to the number and frequency of crimes committed, or to the gravity of those crimes. For these criminals, in particular, it is thought that Indeterminate Sentence would be just the measure adapted to their rehabilitation. Not only is it the view of the United States, which may be regarded as partial to Indeterminate Sentence, but of many in Great Britain. Men who have long laboured for the cause are not easy in their conscience about fixed sentences. Sir Edward Clayton, Chairman of the Advisory Committee appointed under section 14(4) of the Act of 1908 who filled the office for many years, in his Memorandum expresses himself, after his experience at Camp Hill, as a strong advocate of Indeterminate Sentence. He declared that the fixing of a definite limit, irrespective of a man's reformation, may eventually defeat the intention of the Act. The law of Preventive Detention, as contemplated by the original framers, underwent strange transformation in its passage through Parliament. It was intended by the framers that the detention of recidivists, should be in the interests of society for an indefinite period—not for the purpose of reformation,

<sup>1</sup> *The English Prison System*, p. 52.



but only for the purpose of segregation. Parliament was, however, not inclined to accept a proposal which might render a man liable to be detained for life. Accordingly, during the passage through the House of Commons, it was amended, and a definite limit of ten years was fixed as maximum. A new prison for accommodating this special class was constructed at Camp Hill in the Isle of Wight with extensive ground for cultivation, and other amenities. Subsequently, however, Camp Hill was turned into a Borstal Institution and the recidivists were transferred to Portsmouth prison which is now the only prison in England being used for housing men serving sentence of preventive detention. All women sentenced to preventive detention have, until recently, served their time at Holloway Prison, but Holloway has now been demolished and is being wholly reconstructed on the cottage system on an extensive site acquired for the purpose.

## LECTURE XI

### MEASURES AGAINST THE ADOLESCENT AND THE PARTIALLY RESPONSIBLE CRIMINAL

#### THE BORSTAL SYSTEM.

A long period of detention attended by the use of educative machinery, and, in case of improvements, followed by release, is, as we have seen, the root idea of the measures adopted in Great Britain for combating juvenile crimes. What the Reformatory and the Industrial school are to juveniles, the 'Borstal' Institutions are to adolescents, in Great Britain. The principal institutions are at Borstal, Feltham, Camp Hill, and Aylesbury in England, and at Polmont in Scotland. The Borstal is essentially an English institution for the reform of the adolescent criminal. But it has many of the characteristics of the system of Indeterminate Sentence, and there can be no doubt that the inspiration for this new method originally came from the New World. Here is the testimony of Sir Evelyn Ruggles-Brise who was the pioneer of the movement, and for many years its main stay:

My experience and observation had already led me to form a very strong opinion of the penal law which classified forthwith as adult criminals, lads of sixteen as unjust and inhuman. I obtained the authority of the Home Secretary of England, Sir M. Ridley, who was in warm sympathy with my views, to go to the United States in 1897 to study at Elmira the work of what is known as the American State Reformatory System. The annual reports of the authorities at Elmira had begun to attract considerable attention in Europe. The American system classified as youths all persons between the ages of 16 and 30. While we classified our boys as adults, the American adopted the converse method, and classified his adults as boys. I thought myself that the truth lay midway between these two systems, between the system that ends youth too early and that which prolongs it too late, between the voluntary system of England, and the State Reformatory System of the United States. The point I was aiming at was to take the 'dangerous' age 16 to 21, out of the Prison System altogether, and to make it subject to special 'Institutional' treatment on reformatory lines.

I was impressed by all that I saw and learnt at the principal State Reformatories of America, at that time chiefly in the States of New York and Massachusetts. The elaborate system of moral, physical and industrial training of these prisoners, the enthusiasm which dominated the work, the elaborate machinery for supervision of parole, all these things, if stripped of their extravagances,

satisfied me that a real, human effort was being made in these States for the rehabilitation of the youthful criminal. It was on my return that, with the authority of the Secretary of State, the first experiments were begun of the special treatment, with a view to the rehabilitation of the young prisoners, sixteen to twenty-one, in London Prisons. A small Society was formed, known as the London Prison Visitors' Association, to visit these lads in the London Prisons: (they were removed later, as stated, to the old Convict Prison at Borstal). The procedure was to visit Borstal by roster each month, and interview the cases about to be discharged in the following month, so that the best arrangement might be made. Out of the small body of visitors sprang the Borstal Association, and it is interesting now, looking back to that time, to recall the circumstances under which this Association was founded. There was in the public mind a great confusion as to the exact meaning of the phrase 'Juvenile Offender'. The ambiguity has since been largely cleared up by the definitions of the Children Act, but at that time there was a confusing medley of appellations; and children, young persons, and youthful offenders, were all jumbled together in the same category. The specific proposal was to deal with the age sixteen to twenty-one, and it was decided, in order to emphasise this fact, and make a clear distinction between this age and all other ages, to make use of the word "Borstal", i.e., the name of the village where the experiment was being carried out. I think that this appellation has been singularly fortunate in its results, as it has made it quite clear that we are not dealing with the youthful offender as usually conceived, that is, a boy, or even a child, who may have lapsed into some petty or occasional delinquency, and who was being sufficiently provided for by the Reformatory School Acts, and by the Rules concerning juvenile offenders in prisons. Our object was to deal with a far different material, the young hooligan advanced in crime, perhaps *with many previous convictions*, and who appeared to be inevitably doomed to a life of habitual criminal.<sup>1</sup>

It will be observed that it was yet entirely in the stage of experiment carried on by voluntary effort, no doubt with full encouragement from the authorities in charge of the prison department, but with no legislative sanction. It was soon found that the interference of the legislature was essential. No real reform was possible in the case of those adolescent prisoners who had been sentenced to imprisonment for 3 months or 6 months. For imparting anything like a settled tendency towards wholesome ideas and impulses, a little longer time was indispensable. The essential preliminaries needed for getting them out of their ruts, the undoing of habits and tendencies they had formed, called for a reasonable length of disciplined training. Moreover, the conditional liberation itself required some time for a fair trial, so that a careful study might be made during the period; and, if

<sup>1</sup> Ruggles-Brise, *The English Prison System*, pp. 91-92.

the man was found fit for final discharge, proper provision might be made to keep him profitably occupied after discharge. It was at this point when the experiment had made progress, and the difficulties made themselves felt, that legislation had to be invoked to assist the movement. In 1906 i.e., about four years after the experiment had started, a strong representation was addressed to the Secretary of State pointing out the desirability of legislation on the above lines without delay.

### THE PREVENTION OF CRIME ACT, PART I.

This led in due course to the Borstal Act of 1908, known as the Prevention of Crime Act, Part I. (8 Edw. VII C. 59): "An Act to make better provision for the prevention of crime, and for that purpose to provide for the reformation of young offenders and the prolonged detention of habitual criminals, and for other purposes incidental thereto". The Borstal system as it obtains to-day is in essentials the same as the experimental system prior to the Act. The only difference is in some details of working and also in the fact that it has passed beyond the experimental stage and has become an important part of the criminal law of Great Britain. It has also served as the model for similar law and for similar institutions in the Dominions and in this country.

The Act provides that where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the Court (*a*) that, the person is not less than 16, nor more than 21 years of age; and (*b*) that, by reason of his criminal habits and tendencies, or association with persons of bad character, it is expedient that he should be subject for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of his crime, it should be lawful for the Court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention in a Borstal Institution for a term of not less than one year nor more than three years. (The period of one year was subsequently extended by the Criminal Justice Administration Act, 1914, to two years). Provided that before passing such a sentence, the Court shall consider any report or representations which may be made to it, by or on behalf of the Prison Commissioners as to the suitability of the case for treatment in a Borstal Institution, and shall be satisfied that the character, state of health, and the mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid. —(Sec. 1). Sub-section (2) provides that by order of the Secretary of

State and under a special procedure, laid down therefor, a person whose age is above 21, but does not exceed 23, may come within the provisions of the Act. No order under sub-section (2) appears yet to have been made. The application of the Act to reformatory school offences is provided for in the next section. Section 2 provides that, where a youthful offender sentenced to detention in a reformatory school is convicted under any Act before a Court of summary jurisdiction of the offence of committing a breach of the rules of the school, or of inciting to such a breach, or of escaping from such a school, and the Court might under that Act sentence the offender to imprisonment, the Court may, in lieu of sentencing him to imprisonment, sentence him to detention in a Borstal Institution for a term not less than one year (changed to two years under the Criminal Justice Administration Act, 1914), nor more than three years, and in such case the sentence shall supersede the sentence of detention in a reformatory school. The Act also provides that the Secretary of State may, if he is satisfied that a person undergoing penal servitude or imprisoned in consequence of a sentence passed either before or after the passing of the Act, being within the limits of age, within which persons may be detained in a Borstal Institution, may with advantage be detained in a Borstal Institution, authorise the Prison Commissioners to transfer him from prison to a Borstal Institution, there to serve the whole or any part of the unexpired residue of his sentence (Sec. 3). Recognition to Borstal Institutions to be established by the Secretary of State is given under Sec. 4, and power is given to the Secretary of State to make regulations for the rule and management of any Borstal Institution, the constitution of a visiting committee thereof, for the classification, treatment, employment and control of persons sent to it, and for their temporary detention, until arrangements can be made for sending them to the institution; and it is also provided that, subject to any adaptations, alterations, and exceptions made by such regulations, the Prison Acts, 1865 to 1898 (including the penal provisions thereof), and the rules thereunder, shall apply in the case of every such institution as if it were a prison. Thus it is clear that by legislation, as well as through the administration of the Prison Commission, the Borstal now becomes an integral part of the State machinery for individualization of the offender and for protection of society. Power is given under section 5, to the Prison Commissioners, subject to regulations by the Secretary of State, to release on licence any offender after the expiration of six months from the commencement of the term of detention, if a male, and three months if a female, provided they are satisfied that there is reasonable probability that the offender will abstain from crime and lead a useful and industrious

life, and subject to the condition that he will be placed under the supervision or authority of any society or person named in the licence. As a matter of caution, the Act carefully provides (Sec. 6), for a period of supervision after expiration of the term of sentence, and lays down that the offender is to remain under such supervision for a further period of six months (this has subsequently been altered to one year by the Criminal Justice Administration Act). Sub-section (2) of Section 6 provides that the Prison Commissioners may grant to any person under their supervision a licence in accordance with section 5, and may revoke any such licence and recall the person to a Borstal Institution for a period not exceeding three months, and may at any time be again placed out on licence. Provided that a person shall not be so recalled unless the Prison Commissioners are of opinion that the recall is necessary for his protection, and they shall again place him out on licence as soon as possible, and at least within three months after the recall ; and that a person so recalled shall not in any case be detained after the expiration of the said period of six months' supervision. It is necessary to observe that all these detailed instructions were meant to obviate any possibility of a person being detained for an indefinitely long period. From one point of view, the principle is sound as it safeguards the right of the citizen to freedom, specially having regard to the fact that detention in a Borstal for three years, at the maximum, is very often a longer restraint of freedom, in the interests of social protection than an ordinary conviction and sentence for the crime committed might have involved. Section 8 makes the State tutelage complete by providing that any society assisting or supervising persons discharged from Borstal Institutions, either absolutely or on licence will receive Treasury contributions towards its expenses in that behalf.

#### THE CRIMINAL JUSTICE ADMINISTRATION ACT, 1914.

The Criminal Justice Administration Act, 1914 (4 and 5 Geo. V., C. 58) takes the advance a step further towards measures of safety. It describes itself as an Act to "diminish the number of cases committed to prison, to amend the law with respect to treatment and punishment of young offenders, and otherwise to improve the administration of Criminal Justice", and purports to take full advantage of the system of probation which grew up at first without any legal sanction, and has since progressed with the aid of legislation. It encourages the establishment of institutions for the care of young offenders, and brings such institutions as may already be in existence under the supervision of the State by providing for their recognition, if a certain standard of efficiency is maintained. Section 7 of the Act

lays down that if a society is formed, or is already in existence, having as its object the care and control of persons under the age of 21, whilst on probation under the Probation of Offenders Act, 1907, or of persons whilst placed out on licence from a reformatory or industrial school, or Borstal Institution, or under supervision after the determination of the period of their detention in such a school or institution, or under supervision in pursuance of this Act, or some one or more of such objects, the society may apply to the Secretary of State for recognition, and the Secretary of State, if he approves of the constitution of the society, and is satisfied as to the means adopted by the Society, for securing such objects as aforesaid, may grant his recognition to the Society (sub-section (1)). Where a probation order is made by a Court of summary jurisdiction in respect of a person who appears to the Court to be under the age of twenty-one, the Court may appoint any person provided by a recognised society to act as probation officer in the case (sub-sec. 2). Provision is also made for payment to any such recognised society out of moneys provided by Parliament of such sums under such conditions as the Secretary of State with the approval of the Treasury may recommend.

In England the whole of the Borstal system is often spoken of as a branch of prison reform. No doubt these enactments have provided for inter-connection between the prison, the Borstal, the reformatory, the industrial school, and the voluntary societies. But it is easy to perceive that it comprehends much more than mere prison reform in the restricted sense. The substance of the enactments given above shows clearly that this idea of State tutelage and individualization of the offender under such tutelage is gradually modifying, almost replacing, the idea of punishment. In the language of the positivist school, it represents a comprehensive idea of social defence. The very definition and constitution of a Borstal Institution under section 4 of the Prevention of Crime Act, 1908, implies possibilities of the offender, during detention, leading a life different from that of a prisoner—a life with larger opportunities to learn the value of freedom, and to be fitted for freedom, to develop powers of moral reflection, to come in contact with goodness, and to emulate goodness. In reality a Borstal has really turned out to be an institution for the salvage of the young—where not only are the perverse and the vicious broken in, but a true endeavour is made to rehabilitate self-esteem and character for the adolescent offender. Further, the Act gives a large amount of discretion to the judge, for it rests with him to decide in view of the circumstances of each particular case whether the delinquent is a fit subject for Borstal treatment or not. The object of the above short review of the two momentous statutes is to show that in the

Borstal System, as it has developed and as it is at the present moment, we find what, in Continental phraseology, would be called a legislative, a judicial and an administrative realization of measures of social defence, as distinct from vindictive punishment. It is appropriate that such realization in England has come, first of all with reference to juveniles, and juvenile-adults, *i.e.*, adolescents. For, it is when the offender is young that he should be taken in hand. Infancy and youth, when neglected form the very breeding grounds of crime, and, as statistics show, it is there that habitual criminals are made.

It is in this work of salvage of the young, and, through it, the protection of society that the Borstal system has justified itself, as a superior measure. The transformation that it has effected is very well brought out in the following vivid description written on the twenty-first anniversary of its foundation:

“To-day 21 years ago, as the day-light faded on the hills above Chatham, a small group of lads, handcuffed and chained, as the manner was, stood with their warders before the gates of the great convict prison of Borstal. Eyes looked at them through a grill, the great doors opened heavily, and closed behind them, and the Borstal System was born. A few cells were allotted to them—ill-lighted, worse heated; and in these and surrounded by the clang and rattle of the old system, began the new experiment of segregation of young offenders from old, under such discipline and moral influences, and with such industrial and other instruction (to quote the Act) as would conduce to their reformation, and the prevention of crime. Time passed. Those warders who could only bark were replaced by those who could and would talk to their charges; fatherly men, some of them, with perhaps unruly lads of their own, others young and smart with ideas of drill and gymnastics which terrified slackness and built muscle and fibre on ill-developed frames. Presently, the convicts were swept away, and the growing colony of lads was left with a great prison to destroy, and a great reformatory to build: Dingy cells vanished in clouds of dust, and the hands of lads, now first learning to work, built new halls and gymnasias and workshops, and laid out play grounds and beds of flowers”.<sup>1</sup>

The Borstal Association, a large and influential body of public-spirited men consisting of over 1,000 members, and representing different spheres of life, such as Cabinet Ministers, lawyers, penologists, statesmen, journalists and philanthropists, serves as a powerful auxiliary to this work of social defence. The statistics show that 75 per cent. of the Borstal inmates are permanently redeemed and do not revert to crime after discharge.

<sup>1</sup> Borstal Report, 1924.



### MODIFIED BORSTAL SYSTEM.

The Borstal idea is greater than the Borstal Institution. This is shown by the fact that in the case of delinquents of both sexes between the ages of 16 and 21, whatever may be the length of their sentence, who cannot be sent to the Borstal Institution, a so-called 'Modified' Borstal System, has been adopted at all prisons in Great Britain. It aims at applying to these persons as far as possible the same methods as obtain in the Borstal Institution. Where the sentence is short, the results from the nature of the case may not always be so satisfactory. Where the sentences are long, there is enough scope for Borstal methods to operate successfully. In any case this class of prisoners is separated from the adult offenders, and personal interest and supervision on the part not only of the prison authority but of voluntary workers go a long way towards reclamation. Two grades are provided, ordinary and special, the promotion from the ordinary to the special grade being based on "merit marks" and accompanied by special privileges by way of encouragement. At all prisons Borstal Committees are formed, consisting of the members of the Visiting Committees and other earnest workers, for dealing with this class of delinquency.

The difficulty is being increasingly felt in setting up a hard and fast barrier between the delinquents aged 21 and those who are just a little older. There is no distinction in nature viewed from the standpoint of reform. In course of years the "modified" Borstal System bids fair to be adopted in the case of delinquents even up to the age of 30.

### ADOLESCENT CRIMINALS IN INDIA.

The Borstal law has been adopted with necessary modifications in India. The Madras Borstal Schools Act (Act V of 1926), the Bengal Borstal Schools Act (Act I of 1928), the Central Provinces Borstal Schools Act (Act IX of 1928); the Punjab Borstal Act (Act XI of 1926) and the United Provinces Borstal Act (Act VII of 1938) are already in existence. Legislation on the same lines is contemplated, and, it is hoped, will soon be passed in other Provinces. Borstal schools have also been started at Tanjore, and Palamcottah in Madras, at Bankura in Bengal, at Lahore in the Punjab, and a few others are contemplated. The technique of working, however, is not of a high order, and the scarcity of voluntary societies to assist and reinforce the work is keenly felt. In some respects they are not far different from a class of institutions known in this country as Juvenile Jails. The Indian Jails Committee in their report of 1920 made elaborate

recommendations for treatment of adolescent criminals. They advised the establishment of Special Institutions for the treatment of a certain class of adolescent offenders. A period of detention which would be adequate for the ordinary adolescent offender would be quite insufficient for one who is convicted of a grave crime. The former should be placed, in the first instance, in the Special Institution. Those convicted of murder, culpable homicide, rape, dacoity, and the like, and those who have relapsed into crime, after a term of detention in a Special Institution, or who are classed by the Court as incorrigible criminals should be placed in the Juvenile Jails, "a type of institution which is essentially jail-like in character, where labour and education are conducted on jail lines, where remission is earned under jail rules, and where there is no limit to detention except the sentence of the Court".<sup>1</sup> The Special Adolescent Institution to be created should be essentially reformatory in character, and would be for the adolescent what the reformatory school is for the child-offender. They also recommended that the power to commit to a Special Institution should be exercised by all first class magistrates, and by any second class magistrate specially empowered in that behalf. Power should also be given in appropriate cases for a transfer from a Special Institution to a Juvenile Jail, and *vice versa*. At the time when they toured India they found several Juvenile Jails in different parts of India, Tanjore in Madras, Alipore in Bengal, Monghyr in Bihar, Narsinghpur in the C. P., Dharwar in Bombay, Bareilly in the U. P. and Lahore in the Punjab.

#### MEASURES FOR THE PARTIALLY RESPONSIBLE AND THE IRRESPONSIBLE.

Recent thought in Europe and America, as we have found, seeks to solve the problems of penology, not through a study of the crime, but of the individual criminal. When the criminal happens to be what is popularly understood as a normal person, the methods applied are the ordinary methods. In one sense, of course, all criminals may be said to be abnormal. Criminality consists in the incapacity to adapt oneself to laws of social life. When by temperament, by habit, or by force of circumstances, he becomes alienated from society, he turns out a social rebel, a criminal. In fact, all kinds of mental abnormality may be put down as cases of alienation. Hence the term 'alienist' is applied to those specialists, who make it their vocation to study abnormal types of humanity. Apart, however, from this technical sense, a broad line of demarcation may be drawn between persons who are medically normal, and those who are not. There

<sup>1</sup> *Report of the Indian Jails Committee, 1919-1920, Vol. I, Sec. 394, p. 207.*

are various grades of infirmity or semi-infirmity of the mind, and delinquents drawn from these classes of people can hardly be held to be fully responsible. It is a difficult problem for the law of a country to decide which of these are to be held fully responsible, which partially responsible, and which totally irresponsible. Between sanity and insanity there is a long range in which semi-infirm, whose name is legion may be found—such as idiots, imbeciles, and morons ; those suffering from epilepsy and constitutional psychic inferiority ; those suffering from psycho-neurosis, such as neurasthenics, hysterics, psychasthenic, kleptomaniacs, pyromaniacs, and the so-called anxiety-neurotics ; those suffering from mental conflicts, and, lastly, the intoxicated, *i.e.*, the alcoholics, morphomaniacs, cocainomaniacs. Considering the varieties and gradations of infirmity or semi-infirmity, one is driven to the conclusion that some scientific method must be resorted to for the purpose of discovering whether a person charged with an offence is to be regarded as responsible or irresponsible. Various methods have of late been discovered, amongst which may be mentioned the Binet-simon tests (together with the Stanford revision and extension of it), the Terman tests, and Dr. William Healy's tests. But even these tests do not suffice for the purpose of getting at the root-cause of crime in the case of these abnormal individuals. The cause may lie imbedded in heredity, or it may be due to physical defects, or mal-formations from birth, or to some lesion in the nervous system. It may also be due to a great many factors in the past mental history of the person concerned. For these reasons it is being more and more felt that for a proper examination and treatment of these individuals, expert assistance of psychiatrists, alienists, and the like is absolutely indispensable. Until recently, and even now to a certain extent, the administration of justice has been conducted with reference to these individuals who cannot be declared insane, yet who must be declared by science to be other than sane, on the same lines as with normal people. In the United States no general theory of crimes is recognised. As Dr. Healy observes: "In view of the immense complexity of human nature in relation to complex environmental conditions, it is little to us if no set theory of crime can ever be successfully maintained".<sup>1</sup> But practical steps have been taken for the purpose of meeting the difficulty. Psychiatric clinics have been established in Chicago, Boston and other places to give assistance to the Courts for the purpose of discriminating between responsible, partially responsible, and irresponsible individuals. The days of wholesale administration of punishment, based only on the nature of the crime committed, are numbered. Assuming that expert opinion is

<sup>1</sup> Healy. the *Individual Delinquent*.

available, it is necessary that the law should for itself set up a correct standard upon which to proceed. "The inability", says Dr. Healy, "to apply the name of any disease, or any grade of defect should not befog the practical issue". The real point is to determine the causative factors of delinquency as found in the case and the career of the offender. Was he influenced in his act by any abnormal mental condition? If so, what are the chances of his repeating the act? A prognosis of this kind may or may not turn out to be correct, but in any event a prognosis is needed in order that the law may determine whether he should be held in detention and in legal custody, for his own safety and for the safety of the State. Dr. Frank Christian, Superintendent of the New York State Reformatory, Elmira, observes: "Practically all of the persistent violators of the rules in a well-conducted institution will be found to be feeble-minded, mentally or physically abnormal, and I have yet to know of an incorrigible prisoner who could not be so classified. All mental defectives are by no means incorrigible, but all incorrigibles are mentally or physically defective." Dr. Christian's view-point, even if not accepted in its entirety, would raise the question as to whether a certain percentage, at least, of the chronic recidivists should not be exempted from the ordinary treatment accorded in prisons, and be placed under custodial care. The American penologists insist upon no labelled classes of feeble-mindedness, but they do insist upon mental defect, psychosis, psychoneurosis, and psychic constitutional inferiority as being a great causative factor of crime. To meet the requirements of these abnormal criminals they have, in America, not only what are called 'Court Clinics', but also special hospitals for feeble-minded delinquents.

In England too, this consciousness is gaining in intensity. In the Report of the English Prison Commissioners, 1918-1919, the following quotation appears, with their commendation, from the Report of the General Purposes Committee presented to a meeting of the Justices of Birmingham:

"The minds of many of the Birmingham Justices have for a long time been exercised as to the futility and inadequacy of the customary methods of dealing with persons charged with crime, particularly as to the absence of any consideration of the mental condition of such persons. It has been felt that in many cases some mental instability is the fundamental cause of the commission of crime and that treatment, as distinct from punishment (either by fine or by imprisonment), is the proper and sane method to adopt . . . a well-ordered State should clearly make provision for the efficient treatment, and if possible, cure of those who by their acts or mental weakness are a menace to the community, and thus jeopardize their right to freedom . . . what is needed is the provision of facilities for skilled treatment of mental disturbance

(exhibited either by the commission of crime, or other abnormal excess) in its early and curable stage”.

In pursuance of this, arrangements were made in the hospital at Birmingham to set apart a section for the reception and segregation of cases detected before conviction to be cases of mental instability, and a special medical officer was appointed to render every assistance to the magistrate of Birmingham, so as to avoid the application of ordinary prison methods to persons medically unfit, and deemed to be irresponsible for their actions.

Lombroso, it may be remembered based his theory on physical stigmata and put forward the doctrine that the criminal, and especially the habitual criminal differed radically from the normal man.<sup>1</sup> Following upon this declaration, Dr. C. Goring carried on, in England, a long and laborious research based on a statistical survey of thousands of English convicts. In his book “The English Convict” published in 1913, he attacked Lombroso’s view as unsupportable on valid evidence. Though the theory of the ‘Criminal Man’ is no longer believed to be tenable, the broad fact that emerges therefrom is, as testified to by Dr. Goring’s researches, that as a class the criminal is mentally and physically inferior to the general population. The English Prison Commissioners, in their Report, 1913-1914, draw from Dr. Goring’s work the conclusion that “crime can be combated most effectively by segregation and supervision of the obviously unfit, and by removing them to a more restricted sphere where the stress, and competitive conditions of modern life are more flexible and less severe.” Thus scientific opinion in the United States and the United Kingdom converge to the same point.

In truth, though Dr. Goring’s statistical research is aimed at controverting the Lombrosian theory of the anthropological criminal type, his conclusions, from the view-point of practical penology, point pretty nearly to the same goal of measures of social defence as indicated by Lombroso. He holds that the criminal is differentiated from the non-criminal by (a) defective physique, (b) defective mental capacity; and that the ordinary view of the criminal as the product of social inequalities and the victim of adverse circumstances does not go far to account for his criminality. What is more, he holds that the criminal diathesis is influenced by the force of heredity. Other acknowledged authorities,

<sup>1</sup> This led to diverse classifications, of criminals dealt with in lecture III, at the hands of the Italian criminologists. See Lombroso’s classification in the *Criminal Man*; also *Crime, its causes and Remedies*; Ferri’s classification in *Criminal Sociology*, p. 24; Havelock Ellis, *The Criminal*, Chap. I; Goring, *The English Convict*; Parmelee *Criminology*, p. 197; Henderson, *An Introduction to the Study of the Dependent, Defective and Delinquent Classes*; Parson, *Responsibility for Crime*, Chap. II; Parson, *Crime and the Criminal* Chap. IV.

such as Mercier, confirm the view that mental defect as much as epilepsy and insanity are heritable factors. Hence Dr. Goring concludes that "the crusade against crime, may be conducted in three directions. The effort may be made to modify inherited tendency by appropriate educational measures ; or else to modify the opportunity for crime by segregation and supervision of the unfit ; or else—and this is attacking the evil at the very root—to regulate the production of those degrees of constitutional qualities (feeble-mindedness, inebriety, epilepsy, deficient social instinct) which conduce to the committing of crime". The position is thus summed up by Sir Evelyn Ruggles-Brise in his foreword to Dr. Goring's work—"The English Convict":

"Putting aside the part played by different circumstances, and without subscribing to the different views and doctrines which, in the opinion of the author, result from the enquiry, the broad and general truth which appears from the mass of figures and calculations is that, the 'criminal man' is to a large extent a defective man, either physically or mentally, or in the words of Sir B. Donkin is 'unable to acquire the complex characters which are essential to the average man, and so is prone to follow the line of least resistance?'"

There is a wide gulf between the state of scientific opinion regarding mental infirmity or semi-infirmity, and the orthodox law obtaining in the United Kingdom and in India. In the eyes of law, there is no gradation in mental infirmity. A delinquent must be either sane or insane. Legal insanity does not admit of degrees. Hence the course of law is clear-cut, namely, for the insane and irresponsible detention in asylum 'during His Majesty's pleasure', and for the sane and responsible, punishment.

#### THE M'NAGHTEN CASE.

What then is the test of criminal responsibility in doubtful cases of mental infirmity? A person is held criminally liable if, at the moment of committing the criminal act, he is capable of knowing or remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment. He need not have been aware of the fact that it was against the positive law of the land. Criminal responsibility is tested not with reference to knowledge of the law of the land (which is presumed), but of the general principles of morality and right conduct.

The question came up before the House of Lords in the famous M'Naghten Case.<sup>1</sup> Daniel M'Naghten was indicted on a charge of murder of one Edward Drummond, by shooting him with a pistol.

<sup>1</sup> (1843) Cl. & Fin. 200, H. L. ; 8 E. R. 718.

Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner, to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance this: 'That persons, of otherwise sound mind, might be affected by morbid delusions: that the prisoner was in that condition: that a person so labouring under a morbid delusion, might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion: that it was of the nature of the disease, with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity: that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms.

Findal L. C. J. in his charge to the jury put the proposition thus:—  
 "The question to be determined is *whether* at the time the act in question was committed the *prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act.* If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him. The jury returned a verdict of 'not guilty', on the ground of insanity. The verdict and the question as to the nature and extent of the unsoundness of mind which would form the ground of exemption from legal liability were afterwards made a subject of debate in the House of Lords.<sup>1</sup>

It is to be observed that the charge to the jury by Tindal, L.C.J., placed the whole emphasis upon intellectual sanity or insanity. In a case of 'moral' insanity, in the sense of uncontrollable impulses of the mind, co-existing with full possession, or all but full possession, of the reasoning faculties, a person may be rendered quite incapable of resisting himself; but that fact would not exempt him from liability. Only when his understanding is clouded by a temporary or permanent delusion, whether attended by a mental storm or not, *i.e.*, only when the very power of judging right and wrong is held in abeyance, the act, in the eyes of the law, ceases to be voluntary. It is clear, on analysis,

<sup>1</sup> Debate on the 6th and 13th March, 1843; See Hansard's Debates, Vol. LXVII, pp. 288, 714.

that this view is based on the freedom of the will, which acts under the guidance of motives. Where, as in the case of so-called moral insanity, the understanding is completely clouded and held in abeyance the individual is unable to call up the requisite memory pictures which supply the motive power for action right or wrong. In the absence of motive there can be no voluntary action. Hence the law holds that the criterion of responsibility fails.

Following upon the debate in the House of Lords, five questions of law were formulated and put to Her Majesty's Judges. Four of these are necessary for our purpose, they are (1) what is the law respecting alleged crime committed by persons afflicted with insane delusion: . . . . . as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? (2) What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence? (3) In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed? (4) If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused? Tindal L. C. J. gave the answers on behalf of Her Majesty's judges (with the exception of Maule L. J., who stated his opinion separately). The answer to the first question was: that under the circumstances stated in the question the accused would be punishable.

The second and the third questions were answered together thus: The Jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not so accurate when put generally and in the abstract, as when put with reference to the party's know-



ledge of right and wrong in respect of the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction ; whereas the law of the land is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong ; and this course is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The answer of the judges to the fourth question was as follows : The answer must of course depend on the nature of the delusion : but, making the same assumption as before, namely, that he labours under such partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Only two conceivable cases have been mentioned above by way of illustration. In the matter of mental infirmity there is a slight shade of difference between one case and another, so far as the externals are concerned, but on a close scientific examination the result, I apprehend, may be quite different. On the analogy of the above illustrations it is possible to imagine a case where the accused believes himself to be the appointed scourge of God, and to have received an order from On High, to kill a person or persons, a command which he dare not defy. His will having thus been overborne by a higher power superseding all human laws and laws of nature, it may be taken that the plea of insanity will prevail. An interesting problem is presented by the following case : a mother cutting vegetables with a *bainthi*, and with her child playing near about suddenly feels an irresistible impulse to use the *bainthi* on her child for the purpose of seeing how the blood circulates in the body. Prior to the incident she had off and on experienced that consuming curiosity to see the blood course through the veins. On the particular occasion, however,

the impulse proved so overpowering that she was prepared to use her own child for the purpose. The child raised a hue and cry, enabling other people to run to the spot and prevent the mother from accomplishing her purpose. Supposing for the moment, that she had completed the act, would she have been punishable for murder? The answer given by their Lordships in the M'Naghten case seems to offer no solution. But, I presume, it would be fair to draw from the general trend of all the answers given by them that in the case of a delusion attended by mental storm and frenzy, it must be shown that the outbreak was of such a character that, for the time being, the memory and reason of the accused were overborne, and that the influence of motives, or the exercise of will became an impossibility.

Apart from the over-emphasis on the intellectual aspect of the mind at the expense of the emotional, it would appear that the ruling in M'Naghten's case takes no account of the fact, proved by science, that there exists an intermediate zone between reason and madness, which is filled by grades of semi-infirmity, and that the semi-infirm delinquents coming within these grades cannot be held to be either totally responsible or totally irresponsible. It also fails to recognise that besides 'intellectual insanity', there may be various other kinds of insanity, such as the so-called 'moral insanity'.

The expression 'moral insanity' as distinguished from intellectual insanity may be open to objection on the ground of ambiguity or obscurity. It is therefore necessary to make the position clearer. The necessity is all the more felt because there has been some criticism of the term 'moral imbecility' and 'moral insanity' by some recognised psychological penalists. Dr. M. Hamblin Smith observes:

The term 'moral insanity' was first used by Prichard in 1835. At the present time we hear more often of 'moral imbecility'. Almost every writer who has attacked these subjects has used the words in a different sense. But it appears that these differences are really fundamental, and are not due to the loose use of terms . . . . And we come at once to the further question, is there such a thing as a 'moral sense', apart from the intellect? The author has already stated his view that there is no such sense. What we call our 'moral sense', our ideas of 'right and wrong', seems to him to be indissolubly bound up with our social judgments, and with the gradual growth of our social relationships. Intelligence and experience (which depends upon intelligence) enter into the problem. And it really comes to this: If a man believes in the existence of some entity, call it 'conscience', or 'will' or any other name which sits in judgment on our desires, and which finally decides how we should act, having in view some 'absolute' standard of right and wrong, then it is open to that man to believe in a 'moral sense', and in 'moral imbecility'. But if we hold the

doctrine of psychical determinism, then this position is quite untenable.<sup>1</sup>

Dr. Hamblin Smith concludes that it would be well if the terms 'moral insanity' and 'moral imbecility' were both dropped as tending only to confuse the issues. It may be conceded that viewed from the standpoint of psychical determinism as against free-will, the criticism is justifiable. At the same time, without encountering the pit-fall of 'faculty psychology', there is no reason why, for the sake of accurate thinking, the predominance of intellectual, emotional or volitional feeble-mindedness should not be expressed by terms appropriate for the purpose. What is sought to be expressed by 'moral insanity' is that though the understanding of right and wrong may be intact, the power, or faculty, of action is entirely paralysed or overborne in certain types of mental infirmity.

#### THE MENTAL DEFICIENCY ACTS.

We now come to the legislation in the United Kingdom. The Royal Commission on the Feeble-minded was followed by the Mental Deficiency Act, 1913 (3 & 4 Geo. V. C. 28), which carried out the idea to a limited extent, of segregation and supervision of the mentally infirm. The Act adopts the following classification of persons who are mentally defective within the meaning of the Act: (a) Idiots; that is to say, persons so deeply defective in mind from birth, or from an early age as to be unable to guard themselves against common physical dangers; (b) Imbeciles; that is to say, persons in whose case there exists, from birth or from an early age, mental defectiveness, not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children of being taught to do so; (c) Feeble-minded persons, that is to say, persons in whose case there exists, from birth or from an early age, mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection, and for the protection of others, or in the case of children, that they, by reason of such defectiveness, appear to be permanently incapable of receiving proper benefit, from the instruction in ordinary schools; (d) Moral imbeciles; that is to say, persons who from an early age display some permanent mental defect<sup>2</sup> coupled with vicious

<sup>1</sup> *Psychology of the Criminal*, pp. 153-154--Methuen & Co., 1922.

<sup>2</sup> Dr. Hamblin Smith observes: "Now if the definition of moral imbeciles had not contained the words 'some permanent mental defect', it would have covered nearly all habitual offenders. And it may be held that we should adopt the position that habitual delinquency is, *per se*, a proof of permanent mental defect. But the time has not yet come for the complete acceptance of this position. So we are faced by the question, what kind of mental defect, as distinct from that mentioned in the definition of the 'Feeble-minded', is here meant? *The Psychology of the Criminal*, p. 155.

and criminal propensities on which punishment has had little or no deterrent effect (Sec. 1). The Act provides not only for such persons as are already in the care of their parent or guardian, but also for those who are neglected, abandoned, or without visible means of support, or cruelly treated; for those who are found guilty of any criminal offence, and ordered, or liable to be ordered to be sent to a certified industrial school; for those undergoing imprisonment (except imprisonment under civil process), or penal servitude, or undergoing detention in a place of detention by order of a Court, or in a reformatory, or industrial school, or in an inebriate reformatory, or in an institution for lunatics, or a criminal lunatic asylum; for those who are habitual drunkards within the meaning of the Inebriates' Acts, 1879 to 1900; and others (Sec. 2). An order made under the Act, sending a defective to an institution or placing him under guardianship, ordinarily expires at the end of one year, unless continued as provided in the Act (Sec. 11). A Board of Control, consisting of fifteen commissioners of whom twelve are to be paid: and of whom four are to be duly qualified practising barristers, or solicitors, and four duly qualified medical practitioners, and at least one paid and one unpaid to be women, is created under the Act, and charged with the general superintendence of matters relating to the supervision, protection, and control of defectives (Secs. 21, 22). State institutions are provided for the purpose of lodging defectives, as also certification of fitness of private institutions on their application, and on approval (Secs. 35, 36). There are also in the Act provisions for contributions by local authorities and by the Treasury, and for ensuring proper control and supervision of the institutions certified in the way mentioned above.

There have been several Statutes since, relating to Mental Deficiency of which the one of 1927 need only be mentioned. Section 11 of the Act recites all the intervening enactments namely from 1913-1919, and 1925 and says that the Act of 1927 (17 and 18 Geo. V, C. 33) may be cited together with the others as the Mental Deficiency Acts 1913-1927. Besides making modifications in regard to training, treatment, supervision, superintendence etc., it introduces in Sec. 1, certain important changes with regard to definition and classification of defectives. Regarding idiots, the words "persons so deeply defective in mind from birth, or from an early age" are replaced by the words "persons in whose case there exists mental defectiveness of such a degree". Regarding imbeciles the words "from birth, or from an early age" are omitted. Regarding feeble-minded persons, the same omission occurs. The fourth class has been re-named, 'moral-defectives', and they are defined as persons in whose case there exists

mental defectiveness coupled with strongly vicious or criminal propensities, and who require care, supervision and control for the protection of others. Sub-cl. 2 of Sec. 1 further defines 'mental defectiveness'. All these are apparently to meet criticisms offered and difficulties experienced since the enactment of 1913. The amendments indicate a broadening of the idea of State care and custody of the mentally infirm.

In India no reliable statistics are available of the number or percentage of the feeble-minded population. But the figures, if and when available, must be very large. There is no State or social control of the mental defectives. The English statutes have not been adapted and applied to this country. The Indian Jails Committee (1919-20) recommended that in each Province a special institution for mental defectives should be provided in which all persons falling within the definition of defective as laid down in the English Act with the omission of the reference to 'birth or early age' (they were referring to the English Statute of 1913, which had not yet been amended by omission of that expression) can be collected for care and treatment. Accused persons proved by medical evidence to fall within the definition should be committed by the Court to the institution and not to a jail, and the Inspector General of Prison should have power to remove to the institution from prison defective persons who are found in jail.<sup>1</sup> Nothing seems to have been done since to carry out the recommendation.

<sup>1</sup> Report of the Indian Jails Committee 1919-20, para. 340. See also paras. 341-345, 347-351; and App. VII and VIII.

## LECTURE XII

### NEW METHODS FOR OLD

#### THE CRIMINAL JUSTICE BILL, 1938.

Indeterminate sentence is a device for securing the willing co-operation of the delinquent in effecting his own reformation and, through it, effecting his release from detention. It provides an alternative method of qualified restraint for the orthodox method of imprisonment. Its aim is to terminate the period of detention by expediting and consolidating the reform of the individual, whereas the aim of imprisonment is to run its course to the end of the term fixed, and to make it as afflictive, and therefore as deterrent, as possible. The technique of the one is avowedly based on hope, the technique of the other is based on fear.

Penal reform on much the same lines has proceeded in the United Kingdom not with the help of indeterminate sentence but of other allied agencies. One of these agencies, full of possibilities, as we have found, is probation, with conditional discharge and other measures ancillary to it. Until recently, probation was mainly employed for the treatment of juveniles and adolescents, though to a limited extent it was utilised for adults as well. Institutional treatment through reformatories, industrial schools and Borstal institutions was also carried on with respect to children and young persons. All these are alternative methods for imprisonment. In their essence they are subversive of the fixed sentence, and inconsistent with the retaliatory and deterrent idea. At first, these methods were experimentally tried by social workers. But gradually the law came to their aid and accorded its sanction to the experiments. The time, however, was fast approaching for a larger and more comprehensive measure of legislation in aid of penal reform. From this point of view the Criminal Justice Bill of 1938 stands out as a landmark.

In conception and in execution the Criminal Justice Bill, 1938, is worthy of its sponsor Sir Samuel Hoare, the then Home Secretary. Moving for the second reading of the Bill, Sir Samuel said: "Now we are taking the work a long step further and embarking on the third Chapter in which we are attempting to provide alternative methods for imprisonment".<sup>1</sup> The Bill seeks to amend the law relating to the probation of offenders, the supervision of persons by proba-

<sup>1</sup> *Parliamentary Debates, House of Commons*, Nov. 29, 1938 (Vol. 342, No. 16, Col. 272).

tion officers, and the functions of probation officers ; to provide new methods and to reform existing methods of dealing with offenders and persons liable to imprisonment ; to amend the law relating to the management of prisons and other institutions and the treatment of offenders after sentence and of persons committed to custody ; and to consolidate certain enactments relating to the matters above-mentioned. In a word it seeks to bring the whole of the law on a line with the knowledge and experience gained in recent years from the actual working of the existing system by penalists, judges, magistrates, social workers and philanthropists.

After a prolonged debate in the House of Commons the Bill passed through the second reading. Unfortunately, in November 1939, owing to the exigencies of the war it had to be dropped. It is not known when it will be taken up again at the point where it was left off. Most of the provisions, however, were fully considered and we may take it that the principles decided upon will, in no distant future, become the law of England and, it is to be hoped, of India. It would, therefore, be necessary to consider the scheme of legislation fore-shadowed in the Bill. Before we do so, we must picture before our minds' eyes the general situation immediately preceding the introduction of the Bill.

The facts and figures relating to crime in the year 1937 show that the total number of persons found guilty of offences of all kinds was about 900,000 of whom about 7,500 or .9 per cent. were tried by jury, and 99.1 per cent. were dealt with by the magistrates. Of this enormous army of offenders coming within the jurisdiction of the magistrate a large percentage is accounted for by traffic offences and other offences of a minor or technical character which do not come within the purview of penal reform. It is the remainder *i.e.*, a population of about 78,000 persons of all ages, who were found guilty of indictable offences in 1937, that formed the immediate background for the contemplated penal reform. Particularly, 25,000 persons who were sentenced to imprisonment or penal servitude, or Borstal institutions, claimed special attention. Again 19,000 out of the 25,000 were over seventeen, and sentenced to imprisonment without the option of a fine. These crime statistics are necessary to form an idea of the various forms of treatment that the law would have to provide, to meet the requirements of different kinds of offenders. One of the special features of the Bill is the careful provision it makes for the proper treatment and training of the young offenders. The practice of lightly sending young people to prison on a short sentence has turned out to be a dangerous method. It gives them no training for the future, the time being too short for it. As the Lord Chief Justice of England put it, quoting the remark of a prison officer, the effect of a short sentence upon the young is that "they go in crying and come out laughing".

In other words, short sentences have only the effect of destroying for the future any fear 'of prison that they might have had. The object of the Bill is, therefore, to reduce to a minimum the committal of young persons to prison, their proper treatment and training being provided for in an approved school or in a Borstal institution. In fact the Bill contemplates the ultimate abolition of imprisonment as a method of treatment for young offenders, convicted of offences triable by magistrates in the Courts of summary jurisdiction. With these objects in view the Bill amends and consolidates the law relating to the probation system which is contained in the Probation of Offenders' Act, 1907, the Criminal Justice Administration Act, 1914 (Secs. 7, 8 and 9), and the Criminal Justice Act, 1925, Part I. The Probation of Offenders Act, 1907, (Sec. 1) included three methods of dealing with offenders which are essentially different, namely, dismissal, binding over, and the placing of the offender under the supervision of a probation officer. Clauses 17 and 18 of the Bill separate the last mentioned method from the first two, and clause 18 applies the term 'probation' to this method only. It makes it clear that the probation method can be applied to offenders of all ages, so long as the Court "is of opinion that having regard to the circumstances, including the nature of the offence and character and home surroundings of the offender, it is expedient to place him under supervision". The present law enables a Court of summary jurisdiction to deal with cases "without proceeding to conviction". Clause 18 substitutes the words "in lieu of sentencing him", and clause 20 preserves the intention of the existing law that *no disqualification attaching to a conviction shall affect persons*, who after being found guilty are dismissed, bound over, or placed on probation. The application of the probation method is simplified by dispensing with the need for a recognizance, but the principle is preserved that the probation system depends on the consent and willing co-operation of the offender. As regards the organization of the probation service, the Bill [Clause 2 (1)] not only requires the appointment of a sufficient number of probation officers for every area, but also requires the appointment of a woman officer for every petty sessional division. Hitherto no clear distinction has been observed between the two-fold duties entrusted to Probation Committees, namely, on the one hand, the appointment of probation officers and other administrative duties connected with the organization of the probation service ; and, on the other, the review of the work of probation officers in individual cases. Having regard to the importance of "case work", it has been found necessary to make special provision for it. A special scheme for the training of probation officers drawn up by the Home Office is provided for in Cl. 75 (3) (d). Without entering into further details, it is evident that all the weak points of the present probation



system have been strengthened in view of the fact that probation is the master key to the success of any reform scheme.

#### TREATMENT OF YOUNG OFFENDERS.

The facilities afforded for the treatment of young offenders are of a far-reaching character. The main object of the bill, as already observed, is to provide for the abolition of imprisonment of this class of offenders and to substitute alternative methods. Cl. 27(1), (2), (3) imposes immediate restrictions on the use of sentences of imprisonment of young people. Sub-clause (1) is mandatory and lays down that a Court shall not impose imprisonment on any person appearing to the Court to be under sixteen years of age. Sub-clause (2) lays down that a Court shall not impose imprisonment on any person appearing to the Court to be not less than sixteen but under seventeen years of age unless the Court certifies that he is of so unruly a character that he cannot safely be detained in a remand home, or of so depraved a character that he is not fit to be so detained. Similarly, sub-clause (3) provides that a Court of summary jurisdiction shall not impose imprisonment on a person appearing to the Court to be not less than seventeen but under twenty-one years of age, unless the Court has obtained and considered information as to the circumstances, including the character of the said person, and is of opinion that no other method of dealing with him is appropriate; and where the Court imposes imprisonment it shall state the reason for its opinion that no other method of dealing with him is appropriate and the reason shall be specified in the warrant of commitment. Sub-clause (4) provides for the power to prohibit in future Courts of summary jurisdiction from sentencing young offenders. Such prohibition is to be effected by an Order in Council, when other methods of dealing adequately with such offenders have become available.

Further than this, the Bill proposes a series of new institutions for dealing with the young. Some of these institutions are for the young before conviction and some after conviction. Regarding the former, two kinds of new remand homes are proposed; first, a type of State remand homes for children and young persons under seventeen to deal with the problem cases, that is to say, the abnormal cases that need careful medical investigation and 'mental' observation; secondly, remand centres for young people between seventeen and twenty-three. Hitherto the remand homes have been provided only for the very young, consequently during the time that must intervene between the enquiry for collection of data for the Court, and the disposal of the case, a large number of the young who are remanded have to go to prison as under-trials. A large number of boys are placed in Wormwood Scrubs (which receives first offenders) and

they have to wait there either for their trial, or for the allocation to one or other of the Borstal institutions. Obviously this arrangement has its serious drawbacks, because of the baneful influence of prison associations on young minds. The Bill also provides for remand homes for the older offenders, between seventeen and twenty-three, which will offer facilities for investigation of these cases exactly in the same way as in the remand homes for younger persons. (Clauses 10, 11).

Another very wholesome measure is the provision of Compulsory Attendance Centres. The present method of dealing with young people for minor offences is to sentence them to short terms of imprisonment of a week or a fortnight, or a month. The same method is adopted when there is default of payment of a fine imposed. The mischief of short sentences is incalculable and has already been referred to. To obviate it, it is proposed in large centres of population to try the experiment of requiring such young offenders to attend at a compulsory attendance centre, at times when they would otherwise be at leisure during a half holiday or in the evening after work. During their attendance at these centres the young people will be made to do some useful job and receive useful training. Similar centres called 'Juvenile Compulsory Attendance Centres' are to be provided by local authorities in England and Wales for persons between the ages of twelve and seventeen. (Clauses 12 and 29).

For young offenders who, in the opinion of the Court, do not require Borstal training, but ought to be sent away for a time from their homes or from the places where they have fallen into bad habits, or associations, special institutions called Howard Houses meant for persons between sixteen and twenty-one are to be provided by way of a system of residential control. Those sent to these institutions will be under disciplinary conditions outside their working hours, but during the working hours of the day will go out to their ordinary employment. These are specially meant for young people who have no home, or if they have one it is an unsuitable home where there is no control to check them or regulate them. The Howard House will give them a good atmosphere to live in, and at the same time will enable them to go on with their normal work during the day time. (Clauses 13 and 30).

Clause 31 of the Bill is a sequel to Clause 27(3). The latter prohibits Courts of summary jurisdiction from sentencing a young offender to imprisonment unless he is satisfied that no other method of dealing with him is appropriate. This (Clause 31) makes it necessary for the Court to decide whether, of the possible methods available, Borstal training would be appropriate. Thus Clause 31 proposes to give the Courts of summary jurisdiction in England and Wales

the power to pass sentences of Borstal training on persons between the ages of sixteen and twenty-one.<sup>1</sup>

Clause 32 and Clause 47 of the Bill relate to the highly controversial subject of Corporal Punishment. Clause 32 proposes to give effect to the recommendation of the Departmental Committee on Corporal Punishment<sup>2</sup> that the existing powers of the Courts to pass sentences of Corporal Punishment should be abolished. Cl. 47 gives effect to the Committee's recommendations for amending the law relating to Corporal Punishment as a method of dealing with certain serious prison offences.

### PERSISTENT OFFENDERS.

An important set of provisions in the Bill relates to persistent offenders, and are aimed at preventing these parasitic individuals from preying upon society. As far back as the Gladstone Committee on Prisons (1895) measures were being contemplated such as would protect society from their ravages. The Committee recommended that "A new form of sentence should be placed at the disposal of the judges, by which these offenders might be segregated for long periods of detention during which they would not be treated with the severity of first class hard labour, or penal servitude, but would be forced to work under less onerous conditions". This recommendation was given effect to in the Prevention of Crime Act, 1908, Part II, by which a new form of sentence was created known as Preventive Detention, dealt with in a previous Lecture. This form of sentence failed to achieve any substantial results. The very idea that a long sentence of penal servitude should be followed automatically by another long period, by whatever name described, deterred judges as well as juries from declaring an individual as an 'habitual offender', with the result that the system became practically inoperative. The Bill proposes in Cl. 34, in accordance with the recommendations of the Departmental Committee on Persistent Offenders, that in future two new sentences should be instituted, one of corrective detention for the young habitual offender under thirty years of age, and the other, a sentence of preventive detention for the hardened offender over thirty. The sentence of corrective training would be for a period of not less than two, and not more than four years, on persons between twenty-one and thirty years of age, whose records, characters, and habits are such as to make such a sentence expedient for the training of the offender. The sentence of preventive detention would be for a term of not less than two, and not more than four years, on persons over

<sup>1</sup> As regards Scotland Cl. 31 read with Cl. 79 (5) confines the power to the High Court of Justiciary, and the Sheriff Court.

<sup>2</sup> The subject of Corporal Punishment is dealt with more fully in the next section.

the age of thirty, if by reason of the offender's criminal antecedents and mode of life, such a sentence is expedient for the protection of the public. For certain types of offenders with records of repeated crime, it is proposed by the proviso to clause 34 (2) that such sentence shall not exceed ten years. It is to be observed that the sentence is passed in lieu of, and not in addition to, the substantive sentence of imprisonment, as under the Prevention of Crime Act, 1908. Provision is made in Clause 53 to enable persons sentenced to corrective training, and preventive detention to be released on licence before the expiration of their sentences.

#### MENTAL PATIENTS.

Mental cases have received special consideration in the Bill. Clause 38 proposes to give improved facilities to Courts for obtaining a medical report on the mental condition of an offender in order to assist the Court in deciding how to deal with him. It enables the Court to remand the offender on bail requiring him to submit himself to medical examination and providing for payment of the cost of medical examinations at approved institutions, or by approved persons. If an offender is certifiable as a mental defective the Court, in lieu of sentencing him, may under the existing law, make an order for him to be dealt with as a mental defective. But the Court of summary jurisdiction has no similar power in the event of an offender being found certifiable as insane. Clause 39 confers the power on the Court to make an order for the treatment of an offender who is certifiable as insane; Clause 19 relates to offenders who, though not certifiable as insane or mentally defective, are suffering from some form of mental illness or abnormality which may lend itself to treatment; and it provides that the probation order in such a case may include a direction requiring such persons to submit themselves to mental treatment. Clause 6 enables payment to be made for such treatment as part of the expenses of probation committees. Clause 67 substitutes for the term 'criminal lunatic' the term 'State mental patients'. Similarly, the State institution at Broadmoor, the Criminal Lunatic Department of Perth Prison, and the State Asylum in course of construction in Lanarkshire are henceforth to be called 'State Mental Hospitals'. Clause 68 proposes to transfer the responsibility for the control and management of the Broadmoor institution to the Board of Control which is the authority for the management of all State mental institutions.

#### ABOLITION OF PENAL SERVITUDE.

The Bill abolishes penal servitude, together with the ticket-of-leave system. The reason for the abolition is as follows: Under

modern conditions the treatment in prison of persons sentenced to penal servitude and of those sentenced to imprisonment are in all essentials the same. Accordingly the Committee on Persistent Offenders recommended the abolition of the legal distinction between the two. Clause 33 of the Bill carries out this recommendation. As for the ticket-of-leave system by which persons on licence from penal servitude are required to keep the police informed of their place of residence, such a system of surveillance is out of keeping with the whole scheme of corrective measures foreshadowed by the Bill. With the abolition of the penal servitude the distinction between convict prisons and other prisons will cease. Clause 33 also abolishes the present prison divisions. To complete the picture, the same clause abolishes 'hard labour', a term which originally referred to such forms of labour as the crank and the tread-wheel.

As a consequence of the abolition of penal servitude it has been found necessary to repeal certain sections of the Forfeiture Act 1870, which imposes certain disabilities upon persons sentenced to penal servitude. For example, if a person to whom a pension is payable from public funds is convicted of felony and sentenced to a term of imprisonment exceeding twelve months, such pension shall be forfeited. Clause 64 proposes to give to the authority by whom the pension is granted discretion to restore it, either in whole or in part.

In his exposition of the scheme before the House of Commons, Sir Samuel Hoare said:

"In a scheme of this kind there is no place for the remnants of a period that looked at the treatment of crime principally from the angles of retribution and deterrence. I am therefore proposing to sweep away the remnants of former dispensations, now little more than the stage properties of Victorian melo-drama: penal servitude, hard labour, ticket-of-leave, the name 'criminal lunatic', . . . . . These are changes much greater than changes of name. They are the outward and visible signs of the new outlook upon the problems of crime and delinquency."

#### CORPORAL PUNISHMENT.

The subject that aroused more than ordinary heat and controversy in the House of Commons during the debate on the Criminal Justice Bill, 1938 was that of corporal punishment. It is by no means a new or unfamiliar topic. As far back as the eighteenth century, Jeremy Bentham, the great jurist, and utilitarian philosopher thus delivered himself: "The legislator who orders whipping knows not what he does, a judge is nearly as ignorant". It has been abandoned everywhere else in the world except in the United Kingdom, in certain Dominions and in India, as well as in one or two of the States of America. One would have imagined that, with

the dawning sense of the efficacy of humane methods of treatment, the faith in corporal punishments was no longer so deep-rooted as in mediæval times. The debate in the House of Commons, contrary to expectations, disclosed a wide divergence of opinion in and outside the House. There can be little doubt that there is a large volume of public opinion still in favour of its retention on the ground that it is absolutely necessary for public security. The Bill proposed its abolition subject only to an exception in the case of certain prison offences such as mutiny and gross assaults in prisons. Serious objection to this exception was taken on the ground that there was no logical reason why in the case of gross violence done to helpless women and children corporal punishment should not equally be applied. Apart, however, from the question as to what cases should come under the exception, the measure of abolition itself, met with severe opposition. Sir Samuel Hoare gave his reasons for abolition thus: "I am proposing the abolition of corporal punishment for the following reasons: I believe that it is out of date, and that it does not deter the particular individual upon whom it is inflicted from offending again. I believe, further, that it does not protect society from similar crimes in future. These beliefs are not grounded on vague sentiments, but on facts. They are founded on the great body of evidence which was collected by the Committee presided over by a former and highly respected member of this House Mr. Edward Cadogan \* \* \* \* they heard the evidence; they considered it; and they came unanimously to the conclusion that the time had arrived for its abolition".

It would, however, be fair to look at the other side of the picture and consider in brief the character of the opposition and the grounds on which it rested. The offences for which the 'cat' as a form of punishment may be ordered are—robbery with violence, indecent exposure, importuning by male persons, procuration, and living on immoral earnings. The fact that flogging cannot be inflicted on conviction for sexual offences against women and children was commented upon by Mr. Justice Croom-Johnson at Liverpool Assizes who regretted that "the Court had no power to administer personal chastisement to such ruffians—the one punishment which would deter others". Mr. Justice Wright expressed the same view at Glamorgan Assizes: "I think flogging is a punishment which should be inflicted only with great circumspection, and in special circumstances. It is cruel and in a sense brutal punishment but, on the other hand, it is inflicted only on those who themselves have caused pain to innocent victims. Mr. Justice Swift in July, 1932, in the Court of Criminal Appeal observed: "a man who has once been flogged for robbery with violence very rarely repeats that offence". Mr. Justice Oliver at Birmingham Assizes

sentencing a man for robbery with violence in December, 1938, said: "I have yet to meet any one with judicial experience of crime who does not feel that the best weapon to be used against this type of offence is that of flogging". Instances of judges of the High Court expressing strong views in favour of retention of flogging could be multiplied. On the other hand, the opinion of many informed observers is definite on the brutalising effect of the "cat". Mr. Justice Hawkins, later Baron Brampton, a distinguished judge of wide criminal experience said: "If you flog a man, you make a perfect devil of him".<sup>1</sup> The experience of well-known prison officials point in the same direction. Here is a testimony: "What I would particularly like to emphasise, however, is that I never in all my long experience knew of a single case in which the "cat" did not brutalise a man. I never knew one of its victims who was not a worse man in every sense afterwards than he was before \* \* \* it increases their contempt for morals, hardens them unspeakably, and turns them out of prison at the end of their sentences greater human ghouls than when they entered \* \* \* the 'cat' practically in every case confirms criminality in the victim forever. \* \* \* To give the 'cat' is pure vengeance and nothing else. After that reform is hopeless—they become as hard as nails".<sup>2</sup>

It will appear from the above that there is still a strong body of opinion against the abolition of this form of punishment. Its retention is mainly advocated in respect of robbery with violence and also of violence against the person, *i.e.*, gross assaults committed upon men, women, or children, particularly the last two. Whether it can have any wholesome effect on the criminal himself is doubted. But it is vaguely believed that it may contribute to lessen the number of future criminals of that type. May it not be that these believers will be disillusioned as Lord Ellenborough was after his prophecy that the abolition of capital sentence for theft would bring disaster to society?<sup>3</sup>

### THE DEATH PENALTY.

The death penalty has existed from the most ancient times and in all parts of the world. Its retention as well as its abolition has been advocated with equal earnestness and vehemence. Yet it has continued, and opinion is still divided on its expediency or justifiability. In our country, as we have seen, as far back as the days of the Mahabharata, we meet with well-reasoned arguments against the wisdom of inflicting death sentence as the extreme penalty of law. In the

<sup>1</sup> *Flogging: The Law and Practice in England*, by George Benson, M.P.

<sup>2</sup> *His Majesty's Guests*, by 'Warden',—Jarrolds.

<sup>3</sup> See *infra* under 'Death Penalty'.

Buddhistic era, when Ahimsa was the rule of conduct, the moral consciousness as to the iniquity of capital punishment was not wanting. But the death penalty in diverse forms has continued throughout the ages. So in every country, at some time or other, public opinion has found itself divided into hostile camps, one ready to approve and the other ready to condemn its abolition. Modern scientific opinion is by no means agreed as to its retention or its total abolition. A question that has, through the ages, thus presented serious difficulties in the way of a satisfactory solution must necessarily be complex. A large volume of literature has sprung up of late in favour of abolition. It mainly emanates from humanitarian societies. It emphasises the view that human life is too sacred to be lightly sacrificed at the altar of law and that the defence of society may effectively be secured by means other than the death sentence. This view is put forward with the help of statistics, laboriously collected from many countries of the civilised world. On the other hand, the advocates of the death penalty denounce such views as dangerous, void of scientific foundation and indicative of a type of mawkish sentimentality. It is clear, therefore, that the question as to its retention or abolition must be approached after a dispassionate analysis of the causes and conditions, past and present, that underlie the institution of capital punishment. We shall then be in a position to enquire into the valid grounds, if any, for its abolition; and the means, if any, available in modern society for its replacement.

In primitive conditions of society, death by violence was an ordinary phenomenon. War was often the very condition of existence; and in a state of war life must be held cheap, death must be void of terrors. With the gradual humanizing of society, no doubt, greater value came to be placed on the desire of living and the will to live. Nevertheless, it took long to evolve the idea of the sanctity of human life with all its modern content. Hence the death penalty in primitive society was considered nothing extraordinary. It was the best and the quickest method of retribution as well as of deterrence. Apart from individual or tribal retribution, even from the view-point of social security, if the malefactor as a pest to society was to be got rid of, the only way (besides outlawry, which, in effect, came to the same thing) was to eliminate him, or incapacitate him, by death. For the purpose of deterrence, when deterrence entered into the scheme of punishment, as well as for the purpose of retribution, mere death was often found insufficient, it being so common. Hence peculiar forms of death, attended with torture or infamy, were improvised. The problem then was how to make the extreme penalty of law severe enough to strike terror into iron minds. At times, when elimination became the ruling idea, there being no transportation and no organised police



system, the surest and speediest method of cutting the malefactor off from the body politic was to inflict the death penalty.

### MODERN ATTITUDE TOWARDS DEATH PENALTY.

A different attitude characterises modern society in normal times. We have to exclude from our consideration abnormal conditions, such as the state of war when martial or military law prevails, and spies and traitors receive death sentence in the quickest and most summary fashion. The only way to stop these is to stop war itself. In normal modern society, however, from the days of Beccaria onwards the tendency has been to reduce capital punishment to the limits of indispensable necessity. This change has been gradual but steady. The altered, and still altering, attitude of society towards the death penalty is due to two main reasons: an increasing consciousness of the sanctity of human life and a decreasing faith in the efficacy of the death penalty as an effective deterrent. A variety of scientific considerations has gradually undermined the settled faith which preceding generations had in the deterrent value of the death sentence. In the last lecture we dealt with the grades of mental disorder which vitiate the springs of action. Scientific opinion now is more than ever conscious of the fact that, despite deterrents of any description, those mental subjects are likely to commit depredations on society. While, therefore, in their case elimination is essential as a measure of safety for the State, they cannot with any justice be penalised for acts of irresponsibility. Jealousy, sex feeling, fear, hatred combine with epilepsy, psychoneurosis and diverse other kinds of mental infirmity and present a complex from which the crime that results, though apparently pre-meditated, may on scientific examination appear to be the inevitable product of prolonged emotional reaction upon a diseased mind and body. These conditions take away from the so-called murderer the full share of the responsibility foisted on him by law.<sup>1</sup>

That is not all. What the law has to consider is whether offenders drawn from these classes of abnormal, or sub-normal,

<sup>1</sup> Among many cases may be mentioned the well-known Loeb Leopold case as an instance in point. See an article on the subject in the *Journal of Mental Science* by Dr. Hamblin Smith, late Medical Officer of H. M. Prison, Birmingham and Lecturer at Bethlem Royal Hospital, London; also an article by him on 'The Mental conditions found in certain sexual offenders' in *The Lancet*, 1924, I, 643. See also an interesting article from the pen of Enrico Ferri entitled 'A character study of Violet Gibson' in *Revue Internationale de Droit Penal*, Vol. IV, Part III, in which, speaking of Violet Gibson, who attempted the life of Mussolini, Ferri observes: "Insane criminals often have firm and strong will power which, however, is invariably dominated over and brought to confusion by terrifying hallucinations (as in cases of sudden mania in epileptics, alcoholics, etc.) or by fixed impulsive ideas (as in case of chronic delusional insanity, for instance in paranoia). In other words, Gibson has a will power, but a sick will power".

people will in any way be deterred from commission of similar offences. The theory of deterrence rests on the supposition that not only the criminal concerned but others of his class, who may be potential criminals, will take the lesson to heart and when exciting conditions favourable to the commission of a similar offence present themselves in their lives, they will remember the case of the condemned criminal who paid the penalty with his life, and refrain from the act. It thus pre-supposes the power of raising in the mind the requisite memory pictures at the critical moment and of reasoning out from them the proper course of action or inhibition. The mentally sub-normal individuals being often incapable of it, with them the death sentence fails to be deterrent.

But there are other reasons why scientific opinion deprecates capital punishment. Having regard to the fallibility of human justice, it is considered inexpedient to put a man's life in the hands of jurors and judges. Of all murders judicial murder is the most revolting, and there is no reliable safeguard against judicial murder, no more than there is against any human error. The penalty of death is irrevocable. Hence it can only be tolerated when there is absolute certainty about the guilt of the accused. Such certainty is impossible.

Lastly, in view of the growing modern conviction that the principal object of punishment is to reform the offenders, when that is possible, and to restore him to society, the death penalty is found to be entirely out of keeping with the spirit of the new penology. It destroys all possibility of correction, or conversion. There may be some criminals so hardened and inveterate as not to give much hope of reformation, but is it possible to make a positive forecast without trial that a particular offender is irredeemable? If not, is there any justification for sending him to his doom without making a serious attempt to rehabilitate him? This argument applies with special force to crimes committed in a state of passion or frenzy which appears as quickly as it disappears, leaving the criminal a victim of capital punishment. The abolition of the death penalty, it is argued, would allow the principle of penal individualization to be applied at least to murderers of a certain class, if not to all. And, preferably, it should be available to all in the first instance. If it be found that in particular cases there is no hope of any response to reformatory treatment, other methods may be tried.

The other methods from the nature of the case must be either elimination or incapacitation. These are methods not unheard of among ancients. The so-called poetic punishments are to a certain extent based on the idea of incapacitation such as cutting off the hand, of the thief, and the tongue of the blasphemer, or castration

of the sexual offender. But the modern methods divested of mutilation must be different. It may be mentioned in this connection that castration as a general method of incapacitation has been suggested irrespective of sexual offences. This operation, it is said, has the effect of checking the individuals subjected to it from committing acts of violence. It, however, suffers from the disadvantage of doing other injury to character,—it promotes mendacity, deceitfulness and cowardice. In any event, it safeguards society from violent depredations at their hands and also from multiplying their breed.<sup>1</sup>

If incapacitation under proper scientific methods fails, the last alternative in lieu of capital sentence is elimination. This question appears to have been approached in a characteristic manner in England during the first half of the nineteenth century when the reformatory principle of punishment was first making its influence felt. Archbishop Whately in 1832 remarked: "It seems to be entirely reasonable that those who so conduct themselves that it becomes necessary to confine them in houses of correction, should not be turned loose upon society again until they give some indication that they are prepared to live without a repetition of their offence." Matthew Davenport Hill (1792-1872), the famous Recorder of Birmingham, to whose work in the line of penal reform I made a reference in a previous lecture,<sup>2</sup> gave a clear exposition of this principle as follows: "We are reduced, in short, to Incapacitation or to Reformation. Both these expedients, it must be admitted, are of very humble pretensions when contrasted with the ambitious aims of deterrent punishment. Incapacitation limits itself to preventing the criminal from repeating his offence; either for a time, as when imprisonment is employed, or for ever, as by the infliction of death. But as we are in no wise friendly to capital punishment we would only use Incapacitation as furnishing the opportunity for exercising reformatory action on the criminal; or in extreme cases, for withholding from society one who has resisted all endeavours to approve him."<sup>3</sup>

Such permanent elimination by means of imprisonment, as recommended above, would perhaps have been unthinkable in ancient States, owing to the absence of policing or supervision of an efficient order. But there is no reason why it should be so at the present day in any civilised country. Scientific methods of detection as well as of protection have considerably improved during the last two

<sup>1</sup> See Parmelee, *Criminology*, p. 415—Macmillan, 1926. Servier, *La peine de mort remplacée par la castration*, in the *Arch. d. auth. crim.* Vol. XVI, March, 1901, pp. 129-141.

<sup>2</sup> Lecture IX.

<sup>3</sup> Letter of M. D. Hill to C. B. Adderly, Esq., M.P., 1856—quoted in Wines, *Punishment and Reformation*, p. 224.

centuries ; and it should not be difficult to hold in check a class of desperate offenders, which must be limited in number, so as effectively to prevent their escape from imprisonment or their attacks on well-ordered society. With the extensive adoption of reformatory and institutional treatment of the juvenile, the adolescent and the feeble-minded criminals, it is expected that there will be greater possibilities for accommodating the worst criminals who being saved from the gallows, the guillotine or the electric chair would otherwise have been thrown upon society. The prisons run on new lines, with all facilities for individualization, industrial and other education, may house them for treatment and training. There is no reason why this view should not commend itself to far-sighted legislators.

On the other hand, however, there is a strong body of people who still adhere to the view that punishment is primarily to be regarded as the expression of the resentment of society against anti-social conduct, i.e., of universalized, if not individual, resentment. The permanent seclusion of the offender would not suffice to satisfy the requirements of such public indignation. Nor would the ignoring and repression of this public feeling be conducive to the best interests of the body politic. It would be demoralising in its effect and would by encouraging evil indirectly smother the aspiration after the good. Moreover, the argument based on the immunity from legal sanctions of the feeble-minded has its excesses and has actually been driven to absurdities. In America, it is said, almost in every case of murder the plea of insanity or feeble-mindedness of diverse varieties is resorted to, and there is often a travesty of justice resulting from the influence of expert alienists, mostly faddists, on the Courts. Turning to the alternative device of permanent segregation they point to the abuse of the powers of pardon or release by the executive or administrative authorities. It is better to continue under the inexorable regime of the law than come under the arbitrary power of the executive which may result in the dangerous criminals being let loose on society. The last two objections are mainly based on the conditions prevailing in the United States where the personnel of the executive, as well as of the judiciary, changes with the fortunes of party politics and does not enjoy such confidence as in the United Kingdom.

Between the two opposing views, that in favour of abolition of capital punishment is gradually gaining in strength and on grounds of reason and experience bids fair to prevail. Even if the time is not ripe for complete abolition, capital punishment may be reduced to the necessary minimum until such time as may be indicated by public consciousness for its total cessation. The active exertions of the Howard League and of the National Council for the Abolition of

the Death Penalty point to a growing social consciousness in that direction. In 1930 a Committee appointed by the House of Commons including Lord Buckmaster testified to the inefficiency of the death penalty as a deterrent, and its consequent unjustifiability. In the beginning of 1939, a debate in the House of Commons on the Death Penalty resulted in a motion for abolition being carried by 114 votes to 89. The debate took place on a private Member's motion which was couched in the following terms: "That this House would welcome legislation by which the Death Penalty should be abolished in time of peace, for an experimental period of five years." This period was in the main proposal of the Select Committee of 1930, and that is why it was adopted by the mover Mr. Vyvyan Adams. The objection put forward by the Government was itself tantamount to an admission of the strength of the case for abolition, for it was argued that what was proposed under the guise of an experiment might in fact mean the complete abolition of capital punishment. To demonstrate how such a result would bring on disaster, three familiar arguments were advanced in opposition. First, that violent criminals such as those who commit house-breaking and burglary, who do not carry lethal weapons, because they are afraid of the death penalty, would, if the death penalty were abolished, use them for the success of their enterprises or for the purpose of effecting their escape. Secondly, that the great body of public opinion still holds to its faith in the death penalty as essential for the preservation of security. Thirdly, the time is not ripe for it, and if a change so drastic is made in advance of public opinion, the public might take the law into their own hands, and bring the offender to book by lynching him.

What has been said will suffice to show the change that has come over well-informed public opinion in the matter. It is to be hoped that the law will soon be brought into line with the other progressive countries of the world which have abolished the death penalty; such as Norway, Sweden, Denmark, Finland, Holland, Belgium, Italy for political murders, Portugal, most of the cantons of Switzerland, Queensland, Uruguay, and twelve States of the American Union. The remaining thirty-six States of the Union retain the death penalty, but in twenty-four of these the Court or the jury may substitute life-imprisonment for it.<sup>1</sup>

It will be remembered that the reservation of death penalty in England to a very few offences is comparatively modern. Under Henry VIII there were, it is said two hundred and sixty-three crimes punishable by death. As late as 1797 "the number of capital offences

<sup>1</sup> John Lewis Gillin, *Criminology and Penology*, p. 357—The Century Co., New York; Robinson, *Penology in the United States*, pp. 243-246.

without benefit of clergy was 160, and it rose to 222 when the efforts of Sir Samuel Romilly for reform in this matter succeeded only so far as to have pocket-picking, which was capital above one shilling, taken out of the list of capital offences."<sup>1</sup> At the present day in addition to murder, the setting fire to a King's ship, or dockyard, or any ship in the port of London, piracy, and treason<sup>2</sup> are punishable by death.

The Puritan Fathers, while settling in the New World, did their best to reduce the harshness of the English laws from which they had suffered owing to their religious beliefs. Hence the offences which were made punishable by death, numbered about a dozen at the start. At the present moment, the maximum number of offences punishable by death taking all the States into account is six, but in most of the States it does not amount to more than two, of which one is murder, and the other treason, or rape, or kidnapping, as the case may be.

#### TESTIMONY OF STATISTICS.

Statistics are not always a reliable index to actual facts, but taking them as they are, it is beyond question that their testimony does not support the view that the abolition of death penalty leads to increase of crime. In Norway, capital punishment was entirely abolished on the 1st January, 1905. In his report for the years 1905-24, the Chief of the Norwegian Prisons declares that the number of persons convicted of murder has diminished considerably. In Sweden the Chief of the Prison Administration reports that "the reduction in the number of capital sentences and the final abolition of the penalty, so far from leading to an increase of offences of this kind, was actually followed by a notable decrease." Similarly, the representative of the Danish Government on the International Prison Commission observes, "the abolition of capital punishment has not in any way contributed to an increase of such crimes, as were formerly punished by death.....the number of sentences (for murder) has decreased proportionally very considerably."<sup>3</sup>

It is often asserted that statistics in America demonstrate that wherever the death penalty has been done away with, there has been a decided increase in the number of homicides. There seems to be no foundation for the statement. On the contrary, the figures show that homicide rates (i.e., the number of homicides known to the police per annum, per hundred thousand of the population) support

<sup>1</sup> E. F. Du Cane, *The Punishment and Prevention of Crime*, London, 1885, p. 18; L. C. Pike, *A History of Crime in England*, Vol. II, London, 1876, pp. 447-453.

<sup>2</sup> The Execution of Roger Casement for treason took place in 1916.

<sup>3</sup> Pamphlet published by the National Council for the Abolition of the Death Penalty.

the opposite conclusion, in regard to twenty-six States during the eight years 1912-19. "If these are arranged in order of average annual homicidal rates with the lowest first, the first State (with the least deaths by violence) is Maine, where capital punishment has been abolished for nearly forty years. Its homicidal rate is 1.80. Four of the next seven States have abolished capital punishment, and the homicidal rates are less than 3.75. The eight States at the bottom of the list (each with a homicidal rate exceeding 7.00) all retain capital punishment. The States, therefore, which have abolished the death penalty take high rank amongst those with least murders; the States with the most murders retain capital punishment".<sup>1</sup>

It need hardly be mentioned that the criminal statistics of a particular country, including homicidal rates, depend on a plurality of causes in which social, educational, industrial, economic and political factors play their respective parts. It is impossible in such a complex situation to attribute the rise or fall in the homicidal rates to the abolition of the death sentence as the sole determining cause. It is only deep-rooted prejudice which accounts for the view still entertained that the cessation of death penalty, or even a liberalising of the law relating to it by keeping it down to the minimum, and substituting for it imprisonment and individualized treatment, is bound to lead to disruption of society. Similar apprehensions were entertained in England when the abolition of capital punishment for trivial offences, such as shop-lifting, was contemplated. No less a person than Lord Ellenborough, speaking in 1833 in the House of Lords against the contemplated measure thus administered his warning: "Your Lordships will pause before you assent to a measure pregnant with danger to the security of property. The learned judges are unanimously agreed that the expediency of justice and the public security require that there should be no remission of capital punishment in this part of the criminal law." Time has proved Lord Ellenborough to be a false prophet.

### THE LAW IN INDIA.

The law in India is practically the same as in England, with a few variations. The main difference is that it is codified, whereas in England it is mainly governed by precedents, although there are a few special statutes relating to capital sentence. Under the Indian Penal Code, death or transportation may be awarded as punishment for the following offences only: Waging war against the King (Sec.

<sup>1</sup> *America and Capital Punishment*, published by the National Council for the Abolition of the Death Penalty, London.

121); abetting mutiny, actually committed (Sec. 132); giving or fabricating false evidence upon which an innocent person suffers death (Sec. 194); murder (Sec. 302); abetment of suicide of a minor or insane person, or intoxicated person (Sec. 305); dacoity accompanied with murder (Sec. 396); attempt to murder by a person under sentence of transportation, if hurt is caused (Sec. 307). It will be observed that, with the exception of the first two offences and the last, the others are all connected with, or arise out of murder. In pursuance of a resolution of the Government of India, deportation to the Andamans has practically ceased with the exception that a few criminals considered particularly dangerous to society, and some of them connected with political conspiracy, are occasionally sent there. In the majority of cases, however, it has been replaced by imprisonment for life. Sec. 55 of the Indian Penal Code provides that in every case in which sentence for transportation for life shall have been passed, the Government of India, or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

We now come to the main Section (Sec. 302) relating to murder, which provides that whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine. It is clear from the terms of the section that the legislature recognises two sorts of punishment, and leaves it to the discretion of the judge to inflict the one or the other, according to the circumstances of the case. There is no indication given in the Indian Penal Code as to the grounds that will justify the Court in inflicting the one rather than the other sentence. In the Code of Criminal Procedure, however, there is a section which has sometimes been regarded as giving such an indication. Sec. 367, sub-section (5) of the Code of Criminal Procedure runs thus: "If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed." This has led certain Courts to hold that in a case of murder, the sentence of death is the normal punishment to be awarded and the sentence of transportation, being a departure from the normal course, calls for the reason justifying it to be stated in the judgment. It is open to reasonable doubt as to whether a provision in the procedural Code, could be taken to affect in any way the substantive provisions of Sec. 302 of the Indian Penal Code. Nevertheless, it has been held that the terms of Sec. 367 sub-section (5) give a clear guidance to the judge to the effect that he should not ask himself whether to pass the sentence of death



or not, but whether there are reasons for passing the lesser sentence.<sup>1</sup> On the other hand, in *Emperor v. Dukari Chandra Karmakar*,<sup>2</sup> the same question came up for consideration and there was a difference of opinion between two judges of the High Court of Calcutta. Cuming, J., held that it is clear from Sec. 367, Cl. (5), Cr. P. C., that when a person is found guilty of murder, the sentence of death must be the normal sentence, and the sentence of transportation for life is provided only as an abnormal sentence, in passing which, reasons must be given as to why the capital sentence is not passed. It is for the accused to make out extenuating circumstances which would justify the lesser punishment, and not for the Court to presume any. S. K. Ghose, J., differing, took the view that Sec. 367 concerns only the proper form of judgment and cannot be taken to lay down as a matter of substantive law, the measure of the punishment to be inflicted. "The Indian Penal Code simply provides alternative punishment, and there is nothing which takes away from the Court the duty to see that in a particular case the punishment fits the crime. That I consider to be the true measure. Once you admit this, the position that by Sec. 367 Cl. (5), Cr. P. C. death penalty must be the rule becomes untenable. As regards the death sentence, far from making it the ordinary penalty for the relevant offences, the draftsman of the Code stated that it ought to be sparingly inflicted. Experience shows that in practice this has been done, which once more proves that Sec. 367, Cr. P. C., does not touch the essence of the matter at all. Therefore, in fixing the measure of punishment one is to be guided not by Sec. 367, Cr. P. C., but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it. They all go back to the facts of the case." This appears to be the sounder view.

If we are relegated to the facts of the case, we have next to enquire what class of facts would justify the Court in passing a sentence of death, and what other facts would justify the so-called lesser sentence. A reference to the Exceptions under Sec. 300 of the I. P. C., for example, Exception 1, or Exception 4, would obviously be of no assistance for, when the requirements of those Exceptions are satisfied the offence in question ceases to be murder. There must be

<sup>1</sup> *Mir She Yi V. Emperor*, 81 I.C. 945.

<sup>2</sup> 33 C. W. N. p. 1226. Owing to the difference of opinion the case was referred to a third judge C. C. Ghose, J., who held in accordance with precedents that in a case of conviction under Sec. 302 I.P.C., if two judges of the Division Court differ as to the proper sentence to be passed, one favouring the death penalty, and the other transportation for life, that itself is a sufficient ground for holding that the death penalty should not be inflicted. He also held that on the facts it was not a fit case for the death penalty.

facts and circumstances other than those which will justify the Court to withhold the sentence of death and to award transportation or imprisonment for life instead. The reported cases show that a number of circumstances occurring in a variety of cases has influenced the court to hold that it is not proper to award the extreme penalty. For instance, extreme youth, or extreme old age, heat of passion (such as would not come under Exception 4 of Sec. 300), the sex of the accused, the fact that the accused murdered his wife labouring under an unfounded suspicion of her chastity, the fact that an unwanted child was disposed of to hide the mother's shame, have served as good grounds for awarding the alternative sentence. Even suspension of sentence for a long time and the mental agony caused thereby has been regarded as a good ground for not inflicting the death penalty. In *Autor Singh and others v. Emperor*<sup>1</sup> Carnduff J., in laying down the law observed: "I am oppressed by the feeling that the appellants have, through no fault of theirs, had these capital sentences suspended over their heads for nearly six months \* \* \* \* \* On the whole, I think that the law, as it stands in India where the alternative penalties of death and transportation are prescribed for murder it is a matter for my consideration, and that I ought not to confirm the death sentences unless I personally think that they ought to be carried out now. And I believe I am right in saying that delay such as this has, before now, been regarded by judges as a sufficient reason for refraining from imposing the extreme penalty. In this view I will not confirm the sentences of death, but direct that they be altered into sentences of transportation for life".

There is another class of cases which may profitably be referred to. Where the accused, an aborigine, belonging to a most primitive state of society is swayed by superstitious belief in witchcraft and commits the offence of murder under the direct influence of that belief, it has been held that the Court is entitled to award the sentence of transportation for life. I need not refer to more than one or two of these cases. In *Queen v. Osram Sungra*<sup>2</sup> Kemp and Mark J. J. observed: "Absurd and unfounded as that belief was, we think that we are bound to take into consideration and make some distinction between such a case as this and cases in which deliberate murder has been committed from baser motives. We, in no way, countenance the supposition that the existence of such a motive as existed here in any way changes the *nature* of the crime; but we think that as the law has prescribed two different degrees of punishment for the crime of murder, this is a case which, under all the circumstances may be

<sup>1</sup> 17 C. W. N., p. 1213.

<sup>2</sup> (1886) 6 W. R. Cr. 82.

considered not to merit the severer penalty". It is noteworthy that the whole emphasis was on "the nature of the crime"; and in spite of it the sentence of death was not awarded. When the Courts feel that under the law they are entitled to study the criminal, and not only the crime, for the purpose of deciding on the punishment, the infliction of the death penalty may be less frequent. The above case was followed in *Mato Ho v. Emperor*<sup>1</sup> where an aborigine of the Ho tribe committed murder under the influence of similar belief in witchcraft.

The general trend of judicial decisions is that it is the duty of the Court carefully to select the punishment so that it may fit the crime. Assuming that the view that in choosing the sentence of transportation or imprisonment for life in preference to the death sentence, the Court is to look only to the gravity or enormity of the offence, and the circumstances under which it was committed, it must necessarily restrict the Court to a very limited area. The antecedents, the up-bringing, the associations, and the whole social and economic environment of the offender must be beyond the scope of the enquiry. It is these data which are essential for the purpose of its decision as to whether the individual is practically beyond reform, or whether he may be reasonably expected, under proper conditions, to respond to individualized treatment. Without these factors, it seems impossible for the Court in the light of the new penology to assist the State by passing the right sentence. In other words, some means must be discovered whereby, in the matter of the extreme penalty of the law, as much as in the case of other offences calling for lesser sentence, the punishment may be fitted to the criminal and not only to the crime. I am conscious of the difficulty that stands in the way. Under the law of evidence, as it is at present, the facts relating to the personality of the individual are almost wholly irrelevant. But legislation is only the means, and not the end. If the end be to get to the personality of the individual in a special class of cases, and for special purposes, the means to that end will easily be found.

Perhaps an easier method may be found by a liberal use of the prerogative of pardon or of commutation. Section 54 of the Indian Penal Code provides that "in every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code". Section 55 which is allied to Sec. 54 has already been referred to. By a liberal use of the power given under these sections the death sentence in a large number

<sup>1</sup> 1 P. L. T. 282.

of cases may be commuted, even as an experimental measure, to allow individualized treatment a fair chance. This procedure, namely, partial, if not complete, abolition of the death penalty by a liberal use of the prerogative of mercy, has been tried in other countries, and not found wanting. In France the President's prerogative of mercy was utilised for discontinuing the death penalty for a time.

In the estimation of some penologists the deterrent influence of permanent, or almost permanent, segregation is greater than the death sentence, because there are few criminals who can face the prospect of life-long imprisonment with equanimity. They would rather face death. The deterrence of capital punishment is a great deal reduced by reason of the notorious fact that the jurors are averse to sending a man to the gallows, and therefore, as often as they can, they bring in the verdict of "not guilty". The very uncertainty of conviction for murder takes away from the death penalty the dread which the law-breaker may feel for it. If permanent segregation takes the place of the death sentence, the prospect of such chance acquittals will cease to act on the minds of likely criminals. Thus, there are cogent and weighty reasons why the substitution of Segregation or Incapacitation for capital sentence should be given a fair trial.



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